

2944
No. 14805

United States
Court of Appeals

for the Ninth Circuit.

AMERICAN PACIFIC DAIRY PRODUCTS,
INC., a Corporation,

Appellant,

vs.

JOSEPH A. SICILIANO,

Appellee.

JOSEPH A. SICILIANO,

Appellant,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS,
INC., a Corporation,

Appellee.

Transcript of Record

In Two Volumes

Volume I

(Pages 1 to 258)

FILED

Appeals from the District Court
for the District of Guam,
Territory of Guam.

NOV 18 1955

PAUL P. O'BRIEN, CLERK

No. 14805

United States
Court of Appeals
for the Ninth Circuit.

AMERICAN PACIFIC DAIRY PRODUCTS,
INC., a Corporation,

Appellant,

vs.

JOSEPH A. SICILIANO,

Appellee.

JOSEPH A. SICILIANO,

Appellant,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS,
INC., a Corporation,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 258)

Appeals from the District Court
for the District of Guam,
Territory of Guam.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer and Cross-Complaint	42
Ex. A—Articles of Copartnership	50
B—Agreement Dated June 23, 1952 . .	51
C—Assignment of Lease of Real Prop- erty	54
D—Certificate of Copartnership Trans- acting Business Under Fictitious Name	58
E—Excerpts From Minutes of Special Meeting of Board of Directors . . .	59
Answer to Requests for Admissions	130
Appeal:	
Bond for Costs on	125
Notice of	109, 116, 123
Statement of Points on (D.C.G.)	127
Statement of Points and Designation of Record on (U.S.C.A.)	510
Supersedeas and Cost Bond on	117
Attorneys, Names and Addresses of	1
Bond for Costs on Appeal	125

INDEX	PAGE
Certificate of Clerk.....	507
Complaint	3
Ex. A—Articles of Copartnership.....	8
Complaint, Amended	25
Ex. A—Articles of Copartnership.....	30
Cross-Complaint, Amended	79
Demand for Jury Trial.....	82
Docket Entries	490
Findings of Fact and Conclusions of Law, Sup- plemental	110
Interlocutory Judgment	94
Judgment	114
Minutes of the Court.....	500
Motion for Change of Venue on the Ground of Convenience of Parties and Witnesses in the Interest of Justice.....	32
Affidavit of Finton J. Phelan, Jr.....	36
Affidavit of Norman Thompson.....	33
Motion for More Definite Statement and Mo- tion to Strike.....	38
Motion for More Definite Statement.....	38
Motion to Strike.....	40
Motion to Stay, Filed April 18, 1955.....	115
Notice of Appeal, Filed March 19, 1955.....	109
Notice of Appeal, Filed April 30, 1955.....	116
Notice of Appeal, Filed May 5, 1955.....	123

INDEX

PAGE

Objections and Answers to Requests for Admissions	83
Order Taxing Costs.....	124
Opinion	96
Pretrial Order	69
Request for Admission of Facts.....	75
Reply to Counterclaim.....	67
Special Appearance and Motion to Dismiss, Filed October 13, 1954.....	16
Affidavit of Finton J. Phelan, Jr., and At- tached Exhibits	18
Special Appearance and Motion to Dismiss, Filed November 5, 1954.....	30
Statement of Points on Which Appellant In- tends to Rely (D.C.G.).....	127
Statement of Points on Which Appellant In- tends to Rely and Designation of the Record to Be Printed (U.S.C.A.).....	510
Statement of Points Upon Which Plaintiff- Appellee and Cross-Appellant Intends to Rely and Designation of Record.....	511
Supersedeas and Cost Bond on Appeal.....	117
Transcript of Proceedings.....	132
Witnesses, Defendant's:	
Thompson, Edward	
—direct	317
—cross	358
—redirect	382, 435, 452
—by the court.....	383, 453
—recross	438

INDEX	PAGE
Witnesses, Defendant's—(Continued)	
Thompson, Norman	
—direct	388
—cross	413
—redirect	427
Witnesses, Plaintiff's:	
Diza, Ernesto O. (Henry)	
—direct	273
—cross	285
—redirect	296, 307
—by the court.....	297
—recross	307
Meggo, Joseph	
—direct	163
—cross	173
—by the court.....	185
Siciliano, Joseph A.	
—direct	137
—cross	147
—redirect	157
—recross	158
—by the court.....	160
Thompson, Edward	
—direct	187
—cross	259
—redirect	263, 266
—by the court.....	264

NAMES AND ADDRESSES OF ATTORNEYS

LITTLE, LeSOURD, PALMER, SCOTT &
SLEMMONS,

1510 Hoge Bldg.,
Seattle, Washington;

FINTON J. PHELAN, JR., ESQ.,

201 Mesa Bldg.,
Agana, Guam;

For the Appellant.

JOHN A. BOHN, ESQ.,

P. O. Box 771,
Agana, Guam;

WALTER S. FERENZ,

903 First St.,
Benicia, California;

For the Appellee.

In the District Court of Guam in and for the
Territory of Guam

Civ. Cs. No. 59-54

JOSEPH A. SICILIANO,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS,
INC., a Corporation; EDWARD THOMPSON;
NORMAN THOMPSON; FIRST DOE; SEC-
OND DOE; and BLACK and WHITE COR-
PORATION,

Defendants.

COMPLAINT

The Plaintiff complains of the Defendants and
for cause of action alleges:

First Cause of Action

For a first and separate cause of action alleges:

I.

That Plaintiff is ignorant of the true names of
the Defendants sued herein as First Doe, Second
Doe, and Black and White Corporation, a Corpo-
ration, and prays that when the correct names of
said Defendants are ascertained, Plaintiff may have
leave to amend this Complaint accordingly, together
with appropriate charging allegations.

II.

That on or about the 23rd day of June, 1952, the
Plaintiff and the Defendant American Pacific Dairy

Products, Inc., a corporation, organized and existing under the laws of the State of Washington, entered into an agreement for the joint operation of a business to be conducted in Guam under the fictitious firm name and style of "Dairy Queen of Guam," and that said agreement was entitled "Articles of Co-partnership," a copy of said agreement, marked Exhibit A, is hereunto annexed and by this reference made a part hereof.

III.

That subsequent and pursuant to the execution of the said agreement the Plaintiff and Defendant American Pacific Dairy Products, Inc., actively engaged jointly in the business contemplated by said agreement and each of the parties thereto was thereby benefited until the Defendant American Pacific Dairy Products, Inc., wrongfully and in contravention of said Agreement excluded the Plaintiff therefrom.

IV.

That on or about the 4th day of April, 1953, the Defendant American Pacific Dairy Products, Inc., took steps to and actually did exclude and oust the Plaintiff from possession of the assets and all of the books, papers, accounts and records of said Dairy Queen of Guam, and excluded the Plaintiff from any and all participation in the business and the profits therefrom, and at all times thereafter has so excluded and now so excludes the Plaintiff from any access to or benefit of the same; that said exclusion and ouster was done prior to the expira-

tion of the term agreed upon and provided in the said "Articles of Co-partnership," was not by the express will of all the parties, was not bona fide in accordance with any power conferred by the said "Co-partnership Agreement" between the parties, and was caused in contravention of the partnership agreement and rights of the partners.

Second Cause of Action

And for a second and separate cause of action Plaintiff alleges:

I.

Plaintiff repleads all of the allegations contained in Paragraphs I, II, III, and IV of his First Cause of Action, to which reference is hereby made and the same are hereby incorporated and referred to in this Second Cause of Action and made a part hereof as though the same were again fully set forth.

II.

That on or about the 4th day of April, 1953, the Defendants, severally and jointly, did conspire among themselves to exclude the Plaintiff from the business and assets of "Dairy Queen of Guam" to which the Plaintiff was entitled to possession equally with Defendant American Pacific Dairy Products, Inc., and that because of such conspiracy the Defendants entered into possession of the various assets of "Dairy Queen of Guam," such possession being exclusive of the Plaintiff, and did thereby convert said assets and property of "Dairy Queen

of Guam” to their own sole and exclusive use and benefit.

III.

That because of such exclusion of the Plaintiff, the Plaintiff has been unable to determine what specific property each of the said Defendants have entered into possession of, but that the Plaintiff has been informed and believes that among other such assets Defendant Black and White Corporation has wrongfully entered into possession of and exercised and is now exercising certain patent and franchise rights of the “Dairy Queen of Guam” pertaining to the use of certain machinery, processes and methods for the manufacture of the particular soft ice cream and other dairy products, which patent and franchise rights belong exclusively to the “Dairy Queen of Guam.”

Wherefore, Plaintiff prays judgment and decree as follows:

1. That an accounting be taken of the business of “Dairy Queen of Guam,” whereby all Defendants herein shall be required to account for all assets, including profits and good will, of said business;

2. That it be decreed that the Plaintiff be allowed to continue the business in the same name, and that the Defendants and each of them be ordered to convey and transfer to the Plaintiff all of the assets of said “Dairy Queen of Guam”;

3. That the Plaintiff be ordered to pay to the Defendant American Pacific Dairy Products, Inc.,

the value of said Defendant's interest in the "Dairy Queen of Guam" at the time of dissolution, such value not to include the value of the good will of said business and such value to be less damages adjudged against Defendant American Pacific Dairy Products, Inc., for the wrongful breach of the Agreement made a part of this Complaint as may be determined by the accounting prayed for herein;

4. That the amount of all profits of the said "Dairy Queen of Guam" business since the wrongful dissolution thereof, as found by the accounting herein prayed for, be ordered paid to the Plaintiff;

5. That damages for the conspiracy to convert and the conversion of the business assets of the "Dairy Queen of Guam" be adjudged against all of the Defendants and each of them in such an amount as may be determined by this Court through the accounting herein prayed for;

6. That damages may be adjudged against all of the Defendants and each of them, with the exception of American Pacific Dairy Products, Inc., for the injury to the good will and for the loss of profits of "Dairy Queen of Guam" as may be found due pursuant to said accounting herein prayed for;

7. That a permanent injunction be issued against all of the Defendants herein to restrain them from further use of any of the patent or franchise rights of the "Dairy Queen of Guam" and from further injury to the good will of said business; and

8. That the Plaintiff may have such other and further relief as may be just and equitable, together with costs of this action.

/s/ JOHN A. BOHN,
Attorney for Plaintiff.

/s/ ROBERT E. DUFFY,
Resident Counsel.

EXHIBIT A

Articles of Co-partnership

These Articles of Co-partnership made and entered into this 23rd day of June, 1952, by and between American Pacific Dairy Products, Inc., a Corporation duly organized under the laws of the State of Washington, with principal offices in the City of Seattle in said State of Washington, hereinafter referred to as "First Partner," and Joseph Siciliano, a citizen of the United States, with Post Office Box No. 178, Agana, Guam, hereinafter referred to as "Second Partner";

Witnesseth:

In consideration of the premises and the mutual covenants and conditions herein contained, It Is Agreed by and between the parties hereto as follows:

1. The parties hereby agree to become partners

in the business of ice cream, dairy products and allied efforts.

2. Name. The business of the said partnership shall be conducted under the firm name and style of Dairy Queen of Guam.

3. Term. The said partnership shall commence on the day and date of the execution of these Articles and shall continue for a period of fifty (50) years, unless sooner dissolved.

4. Place of Business. The business of the said partnership shall be conducted at such place or places in the territory of Guam and any other geographical location as may be agreed upon by the parties.

5. Capital Contributions. Each of the parties hereby contributes to the capital of the partnership the following respective amounts:

First Partner	\$15,000.00
Second Partner	\$15,000.00

6. Withdrawal of Capital. It is agreed that in no event shall either of the parties withdraw from the firm any amounts which will reduce his capital account below the amount stated in the foregoing paragraph; Provided, However, that upon the joint consent of the parties hereto, subsequent capital contributions may be withdrawn.

7. Salary. During the period that Second Partner shall act as manager of the co-partnership, he shall receive a salary at the rate of Six Hundred

Dollars (\$600.00) per month, as and for compensation for managing the business of the co-partnership so long as it shall have but one (1) wholesale and retail outlet; in the event the company opens a second wholesale and retail outlet, said compensation to Second Partner shall be increased to One Thousand Dollars (\$1,000.00) per month effective the day and date that said second outlet is opened for business; Provided, However, that in the event the co-partnership opens any outlets over and above two (2) outlets, the compensation to be derived by Second Partner for managing said business shall be determined by agreement between the co-partners; and Further Provided that Second Partner shall supervise the erection and construction of any additional units and shall receive as compensation for services to be rendered in connection with said erection and construction, a sum of money equal to ten per cent (10%) of the cost of said outlet.

8. Duties of Partners. First Partner agrees to have its officers, agents and employees devote such time, as may be mutually agreed upon between the partners, to the best interests of the partnership, during the continuance thereof. Second Partner agrees to devote such time, as may be mutually agreed upon between co-partners, together with his skill and energy, to the best interests of the business of the co-partnership.

9. Profits and Losses. The profits arising out of the conduct of the business shall be divided between the parties in the same proportions as their

individual capital contributions bear to the total capital of the partnership and losses shall be borne in the same manner.

10. **Accounts and Books.** Full, just, true and accurate accounts shall be kept of all matters relating to the business to be conducted by the partnership, and the books containing such accounts shall at all times be open to the inspection of both parties hereto. Depreciation of all assets shall be computed based upon eighty per cent (80%) of the useful life of each asset as said useful life is reflected in U. S. Treasury Department, Federal Bureau of Internal Revenue Bulletin F.

11. **Inventory.** On such dates as the partners may mutually agree, during the continuance of the partnership, there shall be taken a full and complete inventory of the business and the parties shall render each to the other a just and true account of all matters and things relating to the said business at the time of taking of such inventory, whereupon the profits and losses, as the case may be, shall be ascertained and divided in accordance with Paragraph 9 of this Agreement.

12. **Option of One Partner to Retire.** In the event either party should desire to retire from the partnership, he shall give the other party written notice of his intention so to do and the remaining partner shall have an option for the ninety (90) days, next ensuing the receipt of such notice, to elect to buy out said retiring partner and acquire

sole ownership of the business of Dairy Queen of Guam in the following manner:

a. An inventory shall be taken on a day to be mutually agreed upon by the partners, and the interest of the retiring partner shall be determined from such inventory and in the manner customarily employed by the firm in preparing its financial statements, with the exception that good will shall be reflected as an amount equal to two and one-half ($2\frac{1}{2}$) times the net profits of the firm for the twelve (12) calendar months immediately preceding the said inventory date, after allowing six per cent (6%) interest on invested capital.

b. Within ten (10) days after the interest of the retiring partner shall have been determined in the manner set forth in the preceding paragraph, he shall be paid by the remaining partner for said interest as follows: one-third ($\frac{1}{3}$) in cash or by duly certified check; one-third ($\frac{1}{3}$) by the remaining partner giving his promissory note for one-third ($\frac{1}{3}$) of the amount of such interest, payable six (6) months from said date, and bearing interest at the rate of six per cent (6%) per annum; and the remaining one-third ($\frac{1}{3}$) by giving a further promissory note for one-third ($\frac{1}{3}$) of the amount of such interest, payable twelve (12) months from said date, and bearing interest at the rate of six per cent (6%) per annum.

13. In Event of Death. In the event of death of Second Partner during the continuance of the

partnership, the firm shall not be dissolved but shall continue by the admission of the heirs of Second Partner if they should so desire, as partners in the place and stead of said deceased partner.

If the heirs of said deceased partner should become partners under the provisions of this paragraph and should subsequently desire to withdraw from partnership, the surviving partner shall have the option to purchase the interest of said retiring heirs in accordance with the provisions of Paragraph 12 of these Articles, anything else in this agreement to the contrary notwithstanding.

The continuance of the firm following the death of the Second Partner shall be subject to the following additional terms and conditions:

a. The salary of the Second Partner shall cease at the time of his death.

b. The surviving partner shall have the sole and exclusive right to select the manager of the business and to fix the salary of said manager; Provided, However, that said salary shall not exceed the salary paid to Second Partner as of the time of his death.

c. If the heirs of the deceased partner should not desire to enter the firm as partners, they shall give to the surviving partner written notice of said decision, and the surviving partner, shall have an option for a period of ninety (90) days next ensuing the day and date of the receipt of said notice, to elect to purchase the interest of the deceased partner, and in the event the surviving partner should

so elect to purchase said interest, the manner of giving notice of said election, the value of said deceased partner's interest, and the manner of payment therefor, shall be the same as and governed by the provisions for the retirement of a partner as set forth in subparagraphs 12 a and b, with the exception that in computing the share of the deceased partner in the business, there shall be charged to the sole account of said deceased partner all costs incident to the termination of the partnership and the determination of the share of said deceased partner, specifically including all expenses incurred in the taking of an inventory of the assets of the partnership and auditing the partnership accounts, and any legal expenses incidental to the dissolution of the partnership.

In Witness Whereof, the parties hereto have set their hands in Agana, Guam, the day and date in this agreement first above written, American Pacific Dairy Products, Inc., by its representative thereunto duly authorized.

AMERICAN PACIFIC DAIRY
PRODUCTS, INC.

By /s/ EDWARD THOMPSON,
President, First Partner.

/s/ JOSEPH SICILIANO,
Second Partner.

Territory of Guam,
City of Agana—ss.

On this 23rd day of June, 1952, before me a Notary Public in and for the territory of Guam, personally appeared Edward Thompson, known to me to be the President of American Pacific Dairy Products, Inc., a Washington corporation, and acknowledged to me that he executed the within instrument as its duly authorized representative.

/s/ PATRICIA E. TURNER,
Notary Public in and for the
Territory of Guam.

My commission expires Aug. 16, 1952.

Territory of Guam,
City of Agana—ss.

On this 23rd day of June, 1952, before me, a Notary Public in and for the territory of Guam, personally appeared Joseph Siciliano, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

/s/ PATRICIA E. TURNER,
Notary Public in and for the
Territory of Guam.

My commission expires Aug. 16, 1952.

Duly verified.

[Endorsed]: Filed September 20, 1954.

[Title of District Court and Cause.]

SPECIAL APPEARANCE AND
MOTION TO DISMISS

The defendant, American Pacific Dairy Products, Inc., specially appears and, pursuant to Rule 12(b) of Federal Rules of Civil Procedure, moves the court as follows:

I.

To dismiss the above-entitled action because it appears on the face of the Complaint that the court lacks jurisdiction over the subject matter.

II.

To dismiss the action on the ground that defendant is a corporation, is not a citizen or resident of the unincorporated territory of Guam in which this action is brought, and is a resident and citizen of the State of Washington.

III.

To dismiss the action because the court is without jurisdiction, and all the named defendants to this action are citizens and residents of the State of Washington and the plaintiff is a citizen and resident of the State of Nevada.

IV.

To dismiss the action because the plaintiff is not entitled to relief herein prayed for in this jurisdiction in that no party to this suit is a resident or

citizen of the unincorporated territory of Guam wherein this action is brought.

V.

To dismiss the action on the ground that process is insufficient as required by Federal Rules of Civil Procedure, Rule 4.

VI.

To dismiss this action on the ground that under the provisions of Section 1391, Title 28, U.S.C.A., this action can only be brought in the Northern Division of the Western District of the Judicial District of Washington or in the Judicial District of Nevada.

VII.

This motion is based upon the pleadings and files in this case and upon the attached affidavits and exhibits.

/s/ FINTON J. PHELAN, JR.,

Attorney for Defendant, American Pacific Dairy,
Products, Inc.

FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,

Attorneys for Defendant, American Pacific Dairy
Products, Inc., 1510 Hogue Building, Seattle 4,
Washington.

[Title of District Court and Cause.]

AFFIDAVIT

Unincorporated Territory of Guam,
City of Agana—ss.

Finton J. Phelan, Jr., being duly sworn, on oath, deposes and says:

1. That he is an attorney-at-law with offices at Suite 201-203, Mesa Building, 1st Street West, City of Agana, unincorporated territory of Guam, and one of the attorneys for the defendants herein.

2. That he has been counsel of record in those certain suits, namely, Civil No. 78-52 and Civil No. 79-52, filed in the District Court of Guam on the 23rd day of October, 1952, in which action Joseph A. Siciliano was named a party defendant and also in that certain action filed in the Island Court of the unincorporated territory of Guam and being known as Civil No. 14-53 wherein Joseph A. Siciliano, the plaintiff herein, was named as a party defendant; and that he was associated with counsel for the defendant in that certain suit filed in the Eighth District Court in and for the County of Clark, State of Nevada, and being known as Civil No. 57911, filed the 21st day of August, 1952, in which suit, Joseph A. Siciliano, the plaintiff herein, was the plaintiff.

3. That that certain action filed in the Eighth District Court in and for the County of Clark, State of Nevada and being known as case No. 57911, was

commenced by a verified complaint wherein Joseph A. Siciliano swore that he was a citizen and resident of the State of Nevada, the said affidavit being verified before one Louis Wiener, Jr., notary public for Clark County, State of Nevada. That on the date of the making of this affidavit said suit is still on the calendar of the Eighth District Court in and for the County of Clark, State of Nevada, and has not been dismissed.

4. That pursuant to the settlement negotiations in connection with the various actions above referred to the said Joseph A. Siciliano executed in the State of Nevada, on the 19th day of August, 1953, a special power of attorney wherein he authorized said attorney in fact to settle the said cases. A copy of said special power of attorney is hereto attached.

5. That pursuant to the said power of attorney referred to in the last preceding paragraph, Lyle H. Turner, as attorney in fact for Joseph A. Siciliano, caused to be executed on the 3rd day of March, 1954, a certain agreement wherein Joseph A. Siciliano, plaintiff in this suit, stated that he was a resident of the City of Las Vegas, County of Clark, State of Nevada. Attached hereto are copies of pages 1, 14, and 15 of said agreement showing said residence in said City of Las Vegas, County of Clark, State of Nevada, together with the signatures and the acknowledgment taken before a Notary Public.

6. On information and belief said plaintiff herein, Joseph A. Siciliano, continues to be a citizen and resident of the City of Las Vegas, County of Clark, State of Nevada, and is within the unincorporated territory of Guam, solely as a temporary or transit visitor for business purposes and further that in making his application for Naval Security Clearance for the purpose of obtaining permission from the Chief of Naval Operations for this business trip to Guam, the said Joseph A. Siciliano said further that he was a citizen and resident of the State of Nevada.

7. Further on information and belief the American Pacific Dairy Products, Inc., is a corporation organized and domiciled in the State of Washington, and is a citizen of said State, maintaining its corporate offices and books in the City of Seattle, in the Northern Division of the Western District of the Judicial District of Washington. The corporate office address is 1113 18th Avenue North, Seattle 2, Washington.

8. That on information and belief Edward Thompson, one of the defendants herein, is a citizen and resident of the State of Washington and is not and has not been a resident of the unincorporated territory of Guam.

9. That on information and belief Norman Thompson, one of the defendants herein, is a citizen and resident of the State of Washington and is not and has not been a resident of the unincorporated territory of Guam.

Further your deponent sayeth not.

/s/ FINTON J. PHELAN, JR.,

Attorney of Record for Defendants, American Pacific Dairy Products, Inc., and Norman Thompson.

Duly verified.

Special Power of Attorney

To Whom It May Concern:

Be It Known that I, the undersigned, hereby authorize Lyle H. Turner, of the firm of Spiegel, Turner & Stevens, for me and in my stead to execute, with the same authority as though executed by myself, a property settlement agreement settling property rights of myself and Angelina Siciliano. The authority to Lyle H. Turner authorizes him to make any agreement for the payment of money, conveyance of property, division of property, agreement to obligations for future payment, or agreement to obligation for immediate payment of such sums of money as he may see fit to pay or authorize to be paid on my behalf to the said Angelina Siciliano.

This authorization shall be effective forthwith and shall be irrevocable for a period of six months from date hereof.

Dated, at Las Vegas, Nevada, this 19th day of August, 1953.

/s/ JOSEPH SICILIANO,

Also Known as Joe Siciliano.

State of Nevada,
County of Clark—ss.

On this 19th day of August, 1953, personally appeared before me, the undersigned, a Notary Public in and for said County and State, Joseph Siciliano, also known as Joe Siciliano, to me known and known to me to be the individual who executed the foregoing instrument and he duly acknowledged to me that the same was executed by him, freely and voluntarily and for the uses and purposes therein mentioned.

/s/ [Indistinguishable.]

Notary Public, Clark County,
Nevada.

My commission expires Aug. 18, 1955.

Agreement

This Agreement, made this 3rd day of March, 1954, by and between Joseph Siciliano, also known as Joseph Anthony Siciliano, a resident of the City of Las Vegas, County of Clark, State of Nevada, and formerly of the district of Maite, municipality of Barrigada, territory of Guam, party of the first part, hereinafter referred to as "Husband," and Angelina Siciliano, a temporary resident of the district Maite, municipality of Barrigada, territory of Guam, party of the second part, hereinafter referred to as "Wife,"

Witnesseth:

Whereas, the parties intermarried at Morrisville, Commonwealth of Pennsylvania, on the 23rd day of December, 1931, and ever since have been and now are husband and wife; and

Whereas, irreconcilable differences have arisen between them which render it impossible to longer continue to live together as husband and wife; and

Whereas, no children have been born of the marriage and no children have been adopted by the parties hereto; and

Whereas, Wife, on the 22nd day of July, 1952, instituted in the Island Court of the territory of Guam, an action for

* * *

Husband shall be addressed to him at the law office of Spiegel, Turner and Stevens, P. O. Box 54, Agana, Guam, or to such other address as Husband may hereinafter designate in writing served upon Wife. Any service to be made as aforesaid upon Wife shall be so addressed to her at the law office of E. R. Crain, P. O. Box 406, Agana, Guam, or to such other address as Wife may hereafter designate in writing served upon Husband.

21. This agreement is declared binding upon the heirs, legal representatives and assigns of both parties hereto.

In Witness Whereof, the parties hereto have caused these presents to be executed in Agana, Guam, the day and date in this agreement first

above written, Husband by his duly authorized attorney in fact.

/s/ ANGELINA SICILIANO,
Party of the First Part.

/s/ JOSEPH ANTHONY
SICILIANO.

By /s/ LYLE H. TURNER,
His Duly Authorized Attorney in Fact, Party of
the Second Part.

Territory of Guam—ss.

On this 4th day of March, 1954, before me, a Notary Public in and for the territory of Guam, personally appeared Angelina Siciliano, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same.

/s/ ENRIQUE R. MESA,
Notary Public in and for the
Territory of Guam.

My commission expires November 23, 1954.

Territory of Guam—ss.

On this 3rd day of March, 1954, before me, a Notary Public in and for the Territory of Guam, personally appeared Lyle H. Turner, known to me to be the person whose name is subscribed to the

within instrument as the attorney in fact of Joseph Anthony Siciliano, and acknowledged to me that he subscribed the name of Joseph Anthony Siciliano thereto as principal, and his own name as attorney in fact.

/s/ MARTHA MACKEY,

Notary Public in and for the
Territory of Guam.

My commission expires May 6, 1955.

[Endorsed]: Filed October 13, 1954.

[Title of District Court and Cause.]

AMENDED COMPLAINT

The Plaintiff complains of the Defendant and for cause of action alleges:

I.

That the court has jurisdiction under section 62 of the Code of Civil Procedure of Guam and that the amount of the assets of the partnership which is the subject of this action, exceeds the sum of Two Thousand Dollars (\$2,000.00).

II.

That on or about the 23rd day of June, 1952, the Plaintiff and the Defendant American Pacific Dairy Products, Inc., a corporation, organized and existing under the laws of the State of Washington and doing business in the Territory of Guam, entered into an agreement for the joint operation of a busi-

ness to be conducted in Guam under the fictitious firm name and style of "Dairy Queen of Guam"; that said agreement was entitled "Articles of Co-partnership" and a copy thereof, marked Exhibit A, is hereunto annexed and by reference made a part hereof.

III.

That subsequent and pursuant to the execution of the said agreement the Plaintiff and Defendant actively engaged jointly in the business contemplated by said agreement and each of the parties thereto was thereby benefited until the Defendant wrongfully and in contravention of said agreement sought to cancel said agreement and exclude the Plaintiff from the operation of said business as hereinafter set forth.

IV.

That on or about the 4th day of April, 1953, the Defendant American Pacific Dairy Products, Inc., took steps to and actually did exclude and oust the Plaintiff from possession of the assets and all of the books, papers, accounts and records of said Dairy Queen of Guam, and excluded the Plaintiff from any and all participation in the business and the profits therefrom, and at all times thereafter has so excluded and now so excludes the Plaintiff from any access to or benefit of the same; that said exclusion and ouster was done prior to the expiration of the term agreed upon and provided in the said "Articles of Co-partnership," was not by express will of all the parties, was not bona fide in accordance with any power conferred by the said "Co-partnership

Agreement'' between the parties, and was caused in contravention of the partnership agreement and rights of the partners.

V.

That the Defendant wrongfully and in contravention of the partnership agreement has declared the same terminated as of May 12, 1953; has notified Plaintiff that its Board of Directors refuses to ratify the partnership agreement and other contracts involving the business, and has taken exclusive possession of all of the assets, books, papers, accounts and records of said Dairy Queen of Guam.

VI.

That the Defendant has wrongfully and in contravention of the partnership agreement denied that the Plaintiff has an interest in the profits of the business or a partnership interest in the assets and control thereof, and has wholly failed to render an accounting to the Plaintiff of the condition of the affairs of the business.

VII.

That the Defendant owns or controls certain patent and franchise rights pertaining to the use of machinery, processes and methods for the manufacture and sale of a particular soft ice cream and other dairy products, which patent and franchise rights were given exclusively to the partnership for use in Guam; that Plaintiff is informed and believes and on that ground alleges that the Defendant has

wrongfully and in contravention of the partnership agreement permitted a competing business known as Guam Frozen Products, Inc., to become established in Guam which has been given the advantage of and is utilizing said patent and franchise rights.

VIII.

That the managing resident agent of the Defendant Corporation has been appointed manager of the business of the partnership and has been given unlimited access to and control of the books, records, papers and trade secrets of the partnership business; that the said manager has also become a stockholder and director of the competing business referred to in paragraph VII hereof; that the president of the Defendant corporation has unlimited access to and control of the books, records, papers and trade secrets of the partnership business and also has become a stockholder of the competing business referred to in paragraph VII hereof.

Wherefore, Plaintiff prays judgment and decree as follows:

1. That pending the trial of this action a Receiver be appointed by the court to take possession and control of the partnership business, to audit the accounts thereof, and to report to the court the result thereof and the condition of the affairs of the business.

2. That an accounting be taken of the business of "Dairy Queen of Guam," whereby the Defend-

ant shall be required to account for all assets, including profits and good will, of said business.

3. That it be decreed that the Plaintiff be allowed to continue the business in the same name, and that the Defendant be ordered to convey and transfer to the Plaintiff all of the assets of said "Dairy Queen of Guam."

4. That the Plaintiff be ordered to indemnify the Defendant by bond approved by the court against all present or future partnership liabilities and to secure the payment to the Defendant by bond approved by the Court, the value of said Defendant's interest in the "Dairy Queen of Guam" at the time of dissolution, such value not to include the value of the good will of said business, and such value to be less damages adjudged against Defendant for the wrongful breach of the partnership agreement.

5. That the Plaintiff may have such other and further relief as may be just and equitable, together with costs of this action.

/s/ JOHN A. BOHN,
Attorney for Plaintiff.

/s/ ROBERT E. DUFFY,
Resident Counsel.

EXHIBIT A

[Exhibit A attached is identical to Exhibit A attached to the original Complaint.]

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed October 26, 1954.

[Title of District Court and Cause.]

SPECIAL APPEARANCE AND
MOTION TO DISMISS

The defendant, American Pacific Dairy Products, Inc., specially appears and, pursuant to Rule 12(b) of Federal Rules of Civil Procedure, moves the court as follows:

I.

To dismiss the amended complaint in the above-entitled action because it appears on the face of the complaint that the court lacks jurisdiction and that the requisite jurisdictional averments are not contained within the complaint.

II.

To dismiss the amended complaint on the ground that defendant is a corporation, is not a citizen or resident of the unincorporated territory of Guam in which this action is brought and is a citizen and

resident of the State of Washington. That the alleged claim of the plaintiff herein as set forth in the amended complaint arose within the State of Washington.

III.

To dismiss the amended complaint herein because the court is without jurisdiction and the defendant in this action is a citizen and resident of the State of Washington, and the plaintiff herein is a citizen and resident of the State of Nevada, and this cause of action arose in the district of defendant's residence.

IV.

To dismiss the amended complaint because the plaintiff is not entitled to the relief herein prayed for in this jurisdiction in that no party to this action is a resident or citizen of the unincorporated territory of Guam, wherein this action is brought and that the claim alleged arose outside this jurisdiction.

V.

To dismiss the amended complaint herein filed in that it fails to state a claim upon which relief can be granted.

VI.

To dismiss the amended complaint filed herein on the ground that process and service is insufficient as required by Federal Rules of Civil Procedure, Rule 4.

VII.

This motion is based upon the pleadings and files

in this case and upon the affidavits and exhibits heretofore filed.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy
Products, Inc.

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy
Products, Inc., 1510 Hoge Building, Seattle 4,
Washington.

[Endorsed]: Filed November 5, 1954.

[Title of District Court and Cause.]

MOTION FOR CHANGE OF VENUE ON THE
GROUND OF CONVENIENCE OF
PARTIES AND WITNESSES IN THE
INTEREST OF JUSTICE

In the alternative, and only in the event that defendant's motion to dismiss the amended complaint is denied, then the defendant moves the court as follows:

I.

To issue an order transferring the above-entitled cause to the United States District Court in and for the Northern Division of the Western District of the State of Washington at Seattle, Washington, on

the ground that such transfer is for the convenience of the parties and witnesses as more clearly appears in the affidavits of Norman Thompson and Finton J. Phelan, Jr., hereto annexed as exhibits A and B.

Dated this 5th day of November, 1954, at Agana, Guam.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy
Products, Inc.

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy
Products, Inc.

[Title of District Court and Cause.]

AFFIDAVIT

Unincorporated Territory of Guam,
City of Agana—ss.

Norman Thompson, being first duly sworn, on oath, deposes and says:

1. That he is familiar with the defendant herein, American Pacific Dairy Products, Inc., and that of his own knowledge the said defendant corporation maintains its principle offices in the City of Seattle, State of Washington, at 1113-18th Avenue North.

2. That at said main offices all the books of account and corporate records are permanently maintained.

3. That all of the employees and agents of said defendant corporation having access and connection with the books, records and files of the defendant corporation reside in and work in the said City of Seattle, State of Washington. That the officers of the said corporation maintain their place of residence and business in the said City of Seattle, State of Washington.

4. That the directors of the said defendant corporation reside in and at the vicinity of said City of Seattle, State of Washington. That all meetings of the Board of Directors and all records of such meetings are held and maintained in the said principle offices of the said defendant corporation in the City of Seattle, State of Washington.

5. That all books of account and other business records of the said corporation are concentrated and maintained at the principle offices of the said corporation, which corporation operates under a centralized accounting and control system.

6. That of his own personal knowledge the vast majority of the witnesses and the records and other evidence which would be introduced in the defense of this action are situated in the said City of Seattle, State of Washington. That the cost of bringing witnesses to the unincorporated territory of Guam for the defense of this action would entail expenses of many thousands of dollars, would disrupt the

operation of the business of the corporation and put a great burden on the corporation and cause heavy financial loss. That bringing the necessary records, files and documents to Guam would be oppressively expensive and cause defendant corporation great financial loss. That many witnesses would have to be brought to the unincorporated territory of Guam in the defense of this action and that adequate quarters and facilities for these witnesses are not available within the unincorporated territory of Guam.

7. That the cost of taking depositions of these numerous witnesses would be burdensome and needlessly expensive, and that to transfer this cause to the United States District Court in and for the Northern Division of the Western District of the City of Seattle, State of Washington, for trial and disposition is in the interest of justice for the convenience of the parties and witnesses and will expedite the disposition of this matter, and in this connection affiant further says that the within action might have been brought in the latter form in the first instance for greater convenience of all the parties and witnesses.

Further your deponent sayeth not.

[Seal]: /s/ NORMAN THOMPSON.

Duly verified.

[Title of District Court and Cause.]

AFFIDAVIT

Unincorporated Territory of Guam,
City of Agana—ss.

Finton J. Phelan, Jr., being first duly sworn, on oath, deposes and says:

1. Affiant is the attorney within the unincorporated territory of Guam for the defendant in the above-entitled action.

2. That he has been informed by officers of the defendant and their counsel that the main office of the defendant is situated within the City of Seattle, State of Washington, at 1113-18th Avenue North.

3. That at said principle office of the defendant corporation all of their corporate records, papers and files are maintained and that likewise all the records and files of the Board of Directors of said corporation are maintained at the principle offices.

4. That the defendant corporation maintains a centralized system of control and all of its business records and management files are maintained at the principle offices of the defendant corporation in the City of Seattle, State of Washington.

5. That all the principle officers, directors and executive employees of the defendant corporation reside in and around the City of Seattle, State of Washington.

6. That the officers, directors and executive employees of said defendant corporation are and will be necessary and important witnesses in the defense of this action.

7. That the defendant corporation will suffer great damage if put to the expense of transporting the officers, directors and other key employees of said corporation to Guam for the trial and defense of this action and that the corporation will be greatly and needlessly injured by the necessary and forced absence of its key officers at such a great distance from the principle office in the City of Seattle, State of Washington.

8. That within the unincorporated territory of Guam are not adequate facilities for the temporary housing of these officers and other witnesses.

9. That the defendant corporation will be heavily damaged and put to great expense by having large amounts of its corporate and business records absent from its principle offices and that this absence will cause great loss in the operation of the business of the defendant corporation.

10. That due to the large number of depositions of officers, directors, employees and accountants which would have to be taken, defendant corporation would be put to great and needless expense, inconvenience and will be hampered in the operation of its business.

11. That the forum of the Northern Division of the Western District at the City of Seattle, State

of Washington, is the most convenient one for the necessary and proper witnesses to attend and that a trial at that forum would incur the least cost and great saving of time for all concerned, and that for the convenience of the parties and witnesses and in the interest of justice to so transfer the case to the United States District Court in and for the Northern Division of the Western District at the City of Seattle, State of Washington, for trial and disposition in which district the within action might have been brought in the first instance is to the convenience of the parties and witnesses and is in the interest of justice in this cause.

Further your deponent sayeth not.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant
Corporation.

Duly verified.

[Endorsed]: Filed November 5, 1954.

[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE STATE-
MENT AND MOTION TO STRIKE

Motion for More Definite Statement

In the alternative, and only in the event that defendant American Pacific Dairy Products, Inc.'s motion to dismiss the amended complaint is denied and the motion for change of venue should there-

after be denied, defendant, American Pacific Dairy Products, Inc., moves the court as follows:

I.

That the amended complaint is so vague and ambiguous that defendant should not reasonably be required to prepare a responsive pleading and defendant American Pacific Dairy Products, Inc., therefore moves that plaintiff be ordered to furnish a more definite statement of the nature of his claim, as set forth, in the following respects:

1. In paragraph III of the amended complaint, plaintiff should be required to indicate when and where the parties hereto "actively engaged jointly in the business contemplated" and further in what manner and by what means defendant "sought to cancel said agreement and exclude the plaintiff from the operation of said business."

2. That in paragraph IV the plaintiff should be required to indicate the steps and actions which defendant "took to and actually did exclude and oust the plaintiff from possession of the assets and all the books, papers, accounts and records of said Dairy Queen of Guam" and to further set forth wherein the alleged exclusion violated the articles of co-partnership and the rights of the partners.

3. That in paragraph V the plaintiff should be required to set forth more fully when, how and where the Board of Directors of the defendant corporation has taken exclusive possession of all the assets, books, papers and accounts of the Dairy Queen of Guam.

4. That in paragraph VI the plaintiff should be required to set forth when and where the defendant denied the plaintiff has an interest in the profits of the business or a partnership interest and when and where the plaintiff demanded or sought an accounting.

5. That in paragraph VII the plaintiff should be required to set forth what patent and franchise rights were given exclusively to the partnership for use in Guam and in what manner the partnership agreement forbids a competing business to become established in Guam.

6. That in paragraph VIII the plaintiff should be required to set forth the extent and nature of the trade secrets of the partnership business and in what manner the fact that an employee or officer of the defendant injures plaintiff by having access to the records of the partnership business.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy
Products, Inc.

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy
Products, Inc.

Motion to Strike

In the alternative, and only in the event that defendant's motion to dismiss the amended complaint is denied, and thereafter the motion for change of

venue and motion for more definite statement be denied, then defendant American Pacific Dairy Products, Inc., moves the court to strike paragraph III of the amended complaint on the ground that it is a conclusion of law and not an allegation of fact.

To strike paragraph V of the amended complaint on the ground that it is a conclusion of law and not an allegation of fact.

To strike paragraph VI of the amended complaint on the ground that it is a conclusion of law and not an allegation of fact.

To strike paragraph VII of the ammended complaint on the ground that it is a conclusion of law and not an allegation of fact.

To strike paragraph VIII of the amended complaint on the ground that it is a conclusion of law and not an allegation of fact, and the further ground that said paragraph VIII is irrelevant and immaterial.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy
Products, Inc.

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy
Products, Inc.

[Endorsed]: Filed November 5, 1954.

[Title of District Court and Cause.]

ANSWER AND CROSS-COMPLAINT

The defendant, American Pacific Dairy Products, Inc., for answer to the complaint herein, admits, denies, and alleges as follows:

I.

The defendant denies the allegations contained in paragraph I of the complaint.

II.

The defendant admits that part of paragraph II of the complaint which alleges that the defendant is a corporation organized and existing under the laws of the State of Washington, but denies each and every other allegation on paragraph II.

III.

The defendant denies the allegations contained in paragraph III of the complaint.

IV.

The defendant admits that American Pacific Dairy Products, Inc., took possession of the assets and all of the books, papers, accounts and records of the Dairy Queen of Guam, and has operated the business exclusively for American Pacific Dairy Products, Inc., but denies each and every other allegation contained in paragraph IV.

V.

The defendant admits it has taken exclusive possession of the assets of said Dairy Queen of Guam

and that it has informed the plaintiff that its Board of Directors has refused to ratify any partnership agreements with the plaintiff, but denies each and every other allegation of paragraph V of the complaint.

VI.

The defendant denies the allegations contained in paragraph VI of the complaint.

VII.

The defendant admits that part of paragraph VII of the complaint which alleges that the defendant owns or controls certain franchise rights pertaining to the use of machinery, processes and methods for the manufacture and sale of a particular soft ice cream and other dairy products, but the defendant denies each and every other allegation of paragraph VII of the complaint.

VIII.

The defendant denies that there is a partnership business and therefore denies each and every allegation of paragraph VIII of the complaint.

Wherefore, having fully answered, the defendant prays that plaintiff's Amended Complaint be dismissed with prejudice and with costs taxed in favor of this defendant and against the plaintiff.

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

The court in this action lacks jurisdiction of the subject matter.

Third Defense

The venue of this action is improper.

Counterclaim

The defendant for cross-complaint against the plaintiff alleges as follows:

I.

On June 23, 1952, Edward Thompson, President of the defendant corporation, entered into certain agreements with the plaintiff purporting to create a partnership between the plaintiff and defendant to be known as "Dairy Queen of Guam." The purported agreements were as follows:

1. Articles of Co-Partnership, a true and correct copy of which is hereto attached and included herein as Exhibit A.

2. Agreement as to the sale of assets by defendant to plaintiff, a true and correct copy of which is attached hereto and included herein as Exhibit B.

3. Assignment of lease by defendant, a true and correct copy of which is attached hereto and included herein as Exhibit C.

4. Certificate of Co-Partnership transacting business under a fictitious name, a true copy of which is attached hereto and included herein as Ex-

hibit D. All of the purported agreements referred to above were subject to ratification by the Board of Directors of the defendant corporation and that fact was known to plaintiff at the time of the execution of the agreements.

II.

At the time the agreements referred to above were negotiated, the defendant had previously leased property upon which to construct a retail store, had acquired necessary licenses, and had actually started operations. The defendant in the development of said business had expended approximately Forty-four Thousand Dollars (\$44,000.00). The defendant did not have a manager for the business and the President of the defendant went to Guam for the purpose of making arrangements for the management of the business, and to develop further business sites. Defendant's President negotiated with plaintiff and plaintiff agreed to manage the business and develop new business sites on the condition he receive one-half of the business. Defendant's President agreed to this arrangement on the basis of plaintiff's representation that plaintiff was in a position to manage and supervise the business and develop future business sites. Plaintiff refused to accept evaluation of the assets of Forty-four Thousand Dollars (\$44,000.00) and did agree to a valuation of only Thirty-eight Thousand Twenty-six Dollars (\$38,026.00). Relying upon the representations of the plaintiff such as his statement that he would personally manage the business and develop new

business sites, the defendant's President made agreements with the plaintiff, subject to ratification of defendant's Board of Directors.

III.

Immediately after execution of the proposed agreements, plaintiff left Guam and devoted none of his personal knowledge, skill or energy to the business or the acquisition of further business, and thereby caused the defendant the loss of profits and future business sites.

IV.

The business was operated in a haphazard manner without proper management. The reports concerning operations were grossly inadequate and the records were negligently and inadequately maintained, the store was being operated on irregular hours, the supervision and management was inadequate, there existed an overstock of supplies, a second store was not started due to the plaintiff's absence, and other new stores were causing competition because of lack of plaintiff's management; and as a consequence sales were far less than they would have been under proper management. The plaintiff did not return to Guam during this period.

V.

On October 6, 1952, the Board of Directors of the defendant was informed of the complete default of the plaintiff immediately after the execution of said agreements and of the uncertainty regarding plaintiff's ability to carry out the agreements and of his

utter disregard of the business, and therefore the Board of Directors of the defendant refused to ratify said agreements unless certain conditions were satisfied, which conditions were set forth in a resolution passed by the Board of Directors of the defendant, a true and correct copy of which is attached hereto as Exhibit E and by this reference made a part hereof. A copy of said resolution was sent to and received by the plaintiff and the plaintiff failed to comply with any of the conditions set forth in the resolution.

VI.

Defendant waited for more than sixty (60) days following passage of said resolution in order to give plaintiff an adequate opportunity to comply with conditions set forth therein, but after receiving no response the President of the defendant wrote to the plaintiff on March 4, 1953, and notified the plaintiff that the Board of Directors would not ratify said agreements unless the conditions were met, and asked for a response before March 15, 1953. The plaintiff received this letter but did not reply thereto.

VII.

In December, 1952, the defendant's President was required to make a special trip to Guam, at considerable expense to the defendant, in order to examine and conduct the affairs of the business and put it on a sound basis. Defendant's President found the business in very poor operating condition due to the lack of adequate management and supervision and de-

fendant's President was required to spend several weeks rehabilitating the business. The necessity for this was caused solely by the failure of the plaintiff to devote any time whatsoever to the conduct of the business.

VIII.

The defendant sent to plaintiff a notice of termination of the purported or de facto partnership effective May 12, 1953, stating that the Board of Directors of the defendant refused to ratify said agreements and thereupon made demand on the plaintiff for an accounting of all funds received by him in connection with the operation of "Dairy Queen of Guam" from June 23, 1952, to date. The defendant therein offered return of the plaintiff's capital contribution of Fifteen Thousand Dollars (\$15,000.00) in an accounting.

IX.

The defendant suffered irreparable harm and injury to its business on account of the failure of the plaintiff under the de facto partnership heretofore operating to perform any services whatsoever or to devote any of his knowledge, skill or energy to the business. If properly managed and directed, the business from the existing store would have made One Hundred Four Thousand Five Hundred Six and 65/100 Dollars (\$104,506.65) during the period from June 23, 1952, to April 30, 1953. Because of lack of adequate and proper management and unnecessary expenses, the business made only Eighty-

one Thousand Three Hundred Sixty-one and 03/100 Dollars (\$81,361.03) during this period. Because of the plaintiff not being available at the existing store and not opening two new stores as projected in the meetings of June, 1952, the defendant suffered a total loss of Forty-five Thousand Seven Hundred Seventy-one and 94/100 Dollars (\$45,771.94). The responsibility of the management and supervision of the business during this period was that of the plaintiff and he failed completely to discharge that responsibility. Defendant not only performed everything agreed to by it but also Defendant's President personally went to Guam to straighten out the business and preserve the investment. As plaintiff has performed no services whatsoever to the de facto partnership, the defendant alleges that plaintiff should not be entitled to any of the net profits therefrom and should account fully for all funds received by him from June 23, 1952, to May 12, 1953.

X.

Because of failure of plaintiff to manage said business and the consequent lack of supervision, the defendant, to preserve the business, was forced to appoint a resident manager therefor for the purpose of stopping any further loss and said business is now being operated on a sound basis.

Wherefore, defendant prays for judgment against the plaintiff as follows:

1. For an order confirming the termination of the de facto partnership heretofore existing between

plaintiff and defendant with regard to "Dairy Queen of Guam" as of May 12, 1953.

2. For an order affirming the defendant's right, title, and interest as the sole owner of the "Dairy Queen of Guam."

3. That the plaintiff account for all monies received during the de facto partnership in the operation of "Dairy Queen of Guam."

4. That the Court decree that the plaintiff receive the original Fifteen Thousand Dollars (\$15,000.00) investment which he made in the business, less any amounts to which the defendant may be entitled under the accounting prayed for in paragraph 3, and less damages in the sum of Forty-five Thousand Seven Hundred Seventy-one and 94/100 Dollars (\$45,771.94) which the defendant has suffered because of plaintiff, including in addition the costs, disbursements, and attorney fees in this action; and further that the defendant receive all the remaining profits and capital interests of "Dairy Queen of Guam."

5. Such other and further relief as the Court may deem proper and lawful.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant.

EXHIBIT A

[Exhibit A attached is identical to Exhibit A attached to the Original Complaint.]

EXHIBIT B

Agreement

This Agreement, made and entered into this 23rd day of June, 1952, by and between American Pacific Dairy Products, Inc., a corporation duly organized under the laws of the State of Washington, hereinafter referred to as American Pacific, Party of the First Part, and American Pacific Dairy Products, Inc., and Joseph Siciliano, co-partners, doing business in the territory of Guam under the fictitious firm name and style of Dairy Queen of Guam, hereinafter referred to as Dairy Queen, Parties of the Second Part,

Witnesseth:

Whereas, the Party of the First Part has prior hereto expended Thirty-eight Thousand Twenty-six Dollars and No Cents (\$38,026.00), in connection with activating a Dairy Queen store in the territory of Guam; and

Whereas, the Parties of the Second Part have this date formed a co-partnership for the purpose of operating said Dairy Queen store and engaging in such other activities as the Parties may subsequently mutually agree, and

Whereas, the Parties hereto desire to clarify the investment in said co-partnership and enter into an agreement regarding other matters as hereinafter provided;

Now, Therefore, in consideration of the premises and mutual covenants and conditions herein contained, it is agreed by and between the Parties hereto as follows:

1. American Pacific hereby sells, transfers and assigns unto the Parties of the Second Part all of the assets of the Dairy Queen store which it has constructed on Guam, including the building, stock in trade, furniture, fixtures, and supplies. There is attached hereto, marked Exhibit "A," a complete itemized list of said assets. The Parties of the Second Part acknowledge that by separate written instrument American Pacific has assigned to Dairy Queen the lease of Lots Nos. 1413, 1413-1 and 1414, Agana, Guam. American Pacific acknowledged that it has received a one-half ($1/2$) interest in said co-partnership and that that interest together with the other provisions of this agreement constitute good consideration for the aforesaid transfer of assets.

2. It is agreed that there is due to American Pacific from Dairy Queen the sum of Eight Thousand Twenty-six Dollars (\$8,026.00) which is to be paid out of the net profits of Dairy Queen, if any there should be. American Pacific acknowledges that there is due from it to the Overseas Construction Company, a Guam co-partnership, the sum of Six Thousand One Hundred Fifty Dollars Fifty-seven Cents (\$6,150.57) and that if Dairy Queen should pay said sum to said Overseas Construction Company, any

amounts so paid shall be debited by Dairy Queen against the said sum due American Pacific, with proof of said payments to be furnished to American Pacific.

3. American Pacific covenants and agrees that if it or Edward Thompson, presently the President of American Pacific, should enter into business in Okinawa of distributing products such as will be distributed in the territory of Guam by Dairy Queen, said Joseph Siciliano shall have the right to acquire a twenty-five per cent (25%) interest in said Okinawa business, on the same basis as American Pacific.

In Witness Whereof, the Parties hereto have set their hands on Guam, the day and date first above written, American Pacific by its representative thereunto duly authorized.

AMERICAN PACIFIC DAIRY
PRODUCTS, INC.,

By /s/ EDWARD THOMPSON,
President, Party of the First
Part.

In Witness Whereof:

/s/ PATRICIA E. TURNER.

AMERICAN PACIFIC DAIRY
PRODUCTS, INC.,By /s/ EDWARD THOMPSON,
President.

In Witness Whereof:

/s/ PATRICIA E. TURNER.

By /s/ JOSEPH SICILIANO,
Parties of the Second Part.

In Witness Whereof:

/s/ PATRICIA E. TURNER.

I agree to individually be bound by the foregoing agreement.

Dated: June 23rd, 1952.

/s/ EDWARD THOMPSON.

EXHIBIT C

(Copy)

Lyle H. Turner,
Attorney-at-Law,
102-3 Aflague Building,
Agana, Guam.

Assignment of Lease of Real Property

Whereas, by written agreement executed on or about the 11th day of October, 1951, American Pacific Dairy Products, Inc., a corporation organized

and existing under and by virtue of the laws of the State of Washington, United States of America, as lessee, leased Lots Nos. 1413, 1413-1 and 1414, Anigua, Guam, M. I., for a term of five (5) years, with an option to renew said lease for an additional term of five (5) years, at a total monthly rental of One Hundred Dollars (\$100.00) per month, and upon the other terms, covenants, conditions, and agreements set forth in said written lease; and

Whereas, the parties hereto desire to effect an assignment of said lease:

Witnesseth:

Now therefore, in consideration of the premises the said American Pacific Dairy Products, Inc., hereby assigns to American Pacific Dairy Products, Inc., and Joseph Siciliano, general co-partners doing business under the fictitious name, firm and style of Dairy Queen of Guam, said partners being hereinafter referred to as Dairy Queen of Guam, the said written lease and the benefits thereof, subject to the payment of the rent and the performance of the covenants, conditions, and stipulations therein contained.

The said American Pacific Dairy Products, Inc., hereby covenants with the said Dairy Queen of Guam that it has not done or suffered any act to be done whereby it is prevented from assigning the said lease agreement, and that it has an absolute right to assign said lease.

The said Dairy Queen of Guam hereby covenants with the said American Pacific Dairy Products, Inc., to perform and observe all of the covenants, conditions, and stipulations in the said lease on its part to be observed.

In Witness Whereof, the parties hereto have caused these presents to be executed in Agana, Guam, this 23rd day of June, 1952, American Pacific Dairy Products, Inc., by its representative thereunto duly authorized.

AMERICAN PACIFIC DAIRY
PRODUCTS, INC.,

By /s/ EDWARD THOMPSON,
President,
Assignor.

DAIRY QUEEN OF GUAM,

By /s/ JOSEPH SICILIANO,
General Co-partner.

AMERICAN PACIFIC DAIRY
PRODUCTS, INC.,

By /s/ EDWARD THOMPSON,
President, General
Co-partner, Assignee.

Territory of Guam,
United States of America—ss.

On this 28th day of June, 1952, before me a Notary Public in and for the territory of Guam, personally appeared before me Edward Thompson,

proved to me to be the President of American Pacific Dairy Products, Inc., a Washington corporation, and acknowledged to me that he executed the foregoing on behalf of said corporation.

.....,

Notary Public in and for the
Territory of Guam.

My commission expires: August 16, 1952.

Territory of Guam,
United States of America—ss.

On this 23rd day of June, 1952, before me a Notary Public in and for the Territory of Guam, personally appeared before me Joseph Siciliano, known to me to be a General Co-partner of that certain business known as Dairy Queen of Guam, and acknowledged to me that he executed the same on behalf of said co-partnership.

/s/ PATRICIA E. TURNER,

Notary Public in and for the
Territory of Guam.

My commission expires: August 16, 1952.

EXHIBIT D

(Copy)

Certificate of Co-partnership
Transacting Business Under Fictitious Name
Territory of Guam,
City of Agana—ss.

We, the undersigned, certify that we are partners transacting a wholesale and retail ice cream, snack bar and dairy products business on Lots Nos. 1413, 1413-1, and 1414, Agana, Guam, under the fictitious name:

Dairy Queen of Guam

The names of all the members of said co-partnership and their respective addresses are as follows, to wit:

Joseph Siciliano, Maite, Barrigada, Guam.

American Pacific Dairy Products, Inc., Seattle,
Washington.

Witness our hands this 25th day of June, 1952.

/s/ JOSEPH SICILIANO,
AMERICAN PACIFIC DAIRY
PRODUCTS, INC.,

By /s/ EDWARD THOMPSON,
President.

On this 25th day of June, 1952, before me personally appeared Joseph Siciliano and Edward Thompson, the latter proved to me to be the Presi-

dent of American Pacific Dairy Products, Inc., a Washington Corporation, and acknowledged to me that they executed the foregoing instrument, said Edward Thompson executing it on behalf of said corporation.

/s/ PATRICIA E. TURNER,

Notary Public in and for the
Territory of Guam.

My commission expires: August 16, 1952.

EXHIBIT E

(Copy)

Excerpts From Minutes of Special Meeting of
Board of Directors

April 4, 1953

Mr. Thompson made a general report concerning operations, but stated that he had not received any figures from Guam since December. He also stated that while he had again written to Joe Siciliano, as authorized at the last meeting of the board, he had not received any word from him, and that it had now been fairly definitely established that Siciliano was not going to return to Guam.

A general discussion followed, in which it was agreed that the company should now refuse to ratify the partnership agreement, should terminate the de facto partnership between Siciliano and American

Exhibit E—(Continued)

Pacific Dairy Products, Inc., under which, during the last eight months, the Dairy Queen store had been operated, tender Siciliano \$15,000.00, being the amount of his original capital contribution, to be made available to Siciliano, however, only in the event he signs a complete release, and forthwith appoint Norman Thompson as Resident Manager of the store and of American Pacific Dairy Products, Inc. On motion duly made and seconded, the following resolutions were unanimously adopted:

“Be It Resolved: That Norman Thompson be and he is hereby appointed Managing Resident Agent of the corporation on the Island of Guam, with the authority to accept summons and process in all legal proceedings and any notices affecting the corporation, on behalf of the corporation.

“Be It Further Resolved: That Norman Thompson be and he is hereby appointed the Manager of ‘Dairy Queen of Guam,’ and is vested with full power and authority to operate and conduct such business on behalf of American Pacific Dairy Products, Inc.

“Be It Further Resolved: That by the above action the authority of all previous managing Resident Agents, including Joseph Siciliano and Albert C. Slaughter, is hereby revoked.

“Be It Further Resolved: That the following notice be given to Joseph Siciliano by the President:

Exhibit E—(Continued)

“ ‘Notice of Termination of De Facto Partnership
Known as “Dairy Queen of Guam”

“ ‘To: Joseph Siciliano, His Agents, Servants
and Attorneys, and to the duly appointed
and acting Receiver in the Civil Action of
Siciliano v. Siciliano, pending in the Is-
land Court in and for the Territory of
Guam, being Civil Case No. 1453.

“ ‘Whereas, on June 23, 1952, Edward Thompson,
president of American Pacific Dairy Products, Inc.,
entered into certain agreements with Joe Siciliano,
detailed as:

“ ‘(1) Articles of Co-Partnership,

“ ‘(2) Agreement (as to sale of assets by
American Pacific),

“ ‘(3) Assignment of Lease by American
Pacific, and

“ ‘(4) Certificate of Co-Partnership trans-
acting business under a fictitious name,

which agreements purported to create a partnership
between American Pacific Dairy Products, Inc., and
Joe Siciliano, to be known as “Dairy Queen of
Guam,” all of said agreements being subject to rati-
fication by the board of directors of American Pa-
cific, and that fact being known to Joe Siciliano;
and

Exhibit E—(Continued)

“ ‘Whereas, by June 23, 1952, American Pacific had leased property upon which to construct a retail store, had virtually finished the construction of the store, and was ready to start operating the same, and had spent approximately \$44,000.00 thereon; and

“ ‘Whereas, Joe Siciliano represented that he could have done the development work and construction of the store for considerably less because of his personal knowledge and skill in such matters as a result of which representations Edward Thompson, president of American Pacific, agreed to reduce the value of the assets of the business from approximately \$44,000.00 to \$38,026.00 for the purposes of the purported partnership; and

“ ‘Whereas, the primary consideration to American Pacific in entering into said agreements was the acquisition of the personal knowledge, skill and energy of Joe Siciliano, his presence on Guam, his personal management of the business, and his agreement to commence work immediately upon a second store; and

“ ‘Whereas, Joe Siciliano left Guam almost immediately after the agreements referred to were executed and has not returned to Guam since that time, and has devoted none of his time, skill or energy to the affairs of the business; and

“ ‘Whereas, the board of directors of American Pacific at a meeting on October 6, 1952, called for

Exhibit E—(Continued)

the purpose of considering said agreements, by resolution refused to ratify said agreements unless certain reasonable conditions caused by Joe Siciliano's continued absence from Guam and failure to devote his time, skill and energy to the business, were complied with within sixty days, amongst which were the following:

“ (a) That written assurance be received from Joe Siciliano that if he did not return to Guam and decided to sell his interest in “Dairy Queen,” that he would offer his interest to American Pacific, first at the price he paid originally for it;

“ (b) That in the event Joe Siciliano did not personally manage the business then American Pacific would have the right to name a manager, and that Joe Siciliano would give written assurance thereof;

“ (c) That an adequate accounting system would be set up with weekly reports of sales and expenses;

“ (d) That a blanket fidelity bond be arranged for the business in the sum of \$20,000.00 to cover all employees; and

“ ‘Whereas, although Joe Siciliano received a copy of said resolution, he has to date made no attempt whatsoever to comply with any of said conditions, but has ignored them altogether; and

Exhibit E—(Continued)

“ ‘Whereas, after American Pacific had waited patiently for more than sixty days and had continuously urged some response from Joe Siciliano with no success, Edward Thompson, president of American Pacific, finally on February 26, 1952, wrote Joe Siciliano a letter setting forth the concern of American Pacific and notifying him that the board of directors would not ratify the agreements because of the failure of Joe Siciliano to comply with the conditions of the resolution referred to above, and further stating concern about the present conditions of the business, and to Joe Siciliano’s continued absence from Guam, and further pointing out:

“ ‘(a) the gross inadequacy of the reports received concerning operations;

“ ‘(b) the irregular hours that the store was being operated;

“ ‘(c) the inadequate supervision and management;

“ ‘(d) the declining gross profits on sales due lack of supervision and management;

“ ‘(e) the overstock of supplies;

“ ‘(f) the failure to start work on a second store because of Joe Siciliano’s absence;

“ ‘(g) the increasing competition to “Dairy Queen of Guam” by the advent of new stores;

Exhibit E—(Continued)

“(h) the fact that Edward Thompson had been required to make a personal trip to Guam at considerable expense to American Pacific to help straighten out the affairs of the store; and

“ ‘Whereas, no response has been received whatsoever from Joe Siciliano to said letter, nor has any report on sales or profits been received by American Pacific since December 31, 1952; and

“ ‘Whereas, it is necessary in order to preserve the business that immediate steps be taken to provide adequate management, and supervision, and American Pacific has appointed Norman Thompson to manage the business on its behalf and to be American Pacific’s Managing Resident Agent on Guam succeeding all others heretofore appointed;

“ ‘Now, Therefore, you are hereby notified that:

“ ‘(1) The Board of Directors of American Pacific Dairy Products, Inc., refuses to ratify and approve the following agreements entered into in its behalf by Edward Thompson, its president, on June 23, 1952: Articles of Co-partnership; Agreement (as to sale of assets by American Pacific); Assignment of Lease; Certificate of Co-Partnership transacting business under a fictitious name.

“ ‘(2) The de facto partnership heretofore operating the “Dairy Queen of Guam” is hereby terminated effective April 21, 1954.

Exhibit E—(Continued)

“(3) There is herewith tendered to you, or to the Receiver in the action of *Siciliano v. Siciliano* presently pending against you, if the court should so order, the sum of Fifteen Thousand Dollars (\$15,000.00) representing your initial capital interest in the purported partnership, from funds of the purported partnership on deposit in the Bank of Guam, on the condition that the following documents, to be placed in the hands of said bank, are duly executed: (a) Acceptance of Termination of de facto Partnership known as “Dairy Queen of Guam”; (b) Reassignment to American Pacific of Leases; (c) Agreement Transferring Assets to American Pacific.

“(4) Norman Thompson has been appointed Managing Resident Agent of American Pacific and Manager of “Dairy Queen of Guam” and demand is hereby made for an accounting to him on behalf of American Pacific, and return of, all funds received in connection with the operation of “Dairy Queen of Guam” other than the sum of \$15,000.00 hereinabove tendered to you in the above paragraph.’ ”

It is also decided to open a new bank account on Guam in the name of American Pacific Dairy Products, Inc., into which all of the funds (other than the \$15,000.00 to be tendered to *Siciliano*) now held in the account of the Dairy Queen should be transferred, and the president, the secretary and the

Exhibit E—(Continued)

resident manager on Guam would each be authorized to withdraw funds therefrom. It was the general concensus of opinion that Mr. Norman Thompson, as resident manager, would only need a relatively small revolving fund in the Guam account to pay monthly expenses, and that most of the remaining cash, if any, and proceeds of current operations could be transferred to the company's bank account in the Bank of California in Seattle. Mr. Norman Thompson was authorized to open the new account.

Duly verified.

[Endorsed]: Filed December 23, 1954.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM

Comes now the plaintiff in the above-entitled action and replying to defendants' counterclaim, labelled Cross-Complaint, contained in defendants' answer on file herein, admits, denies and alleges as follows, to wit:

Reply to Counterclaim

I.

Replying to paragraph I of said counterclaim, admits the execution of the documents described in said paragraph I, and denies each and every, all and singular, the other allegations therein contained.

II.

Replying to paragraphs II, III and IV contained in said counterclaim, denies each and every, all and singular the allegation therein contained.

III.

Replying to paragraph V of said counterclaim, admits he received a copy of the resolution therein referred to, and denies each and every, all and singular the other allegations therein contained.

IV.

Replying to paragraphs VI and VII of said counterclaim, denies each and every, all and singular the allegations therein contained.

V.

Replying to paragraph VIII of said counterclaim, admits that he received a purported notice of termination of the partnership and denies each and every, all and singular the other allegations therein contained.

VI.

Replying to paragraphs IX and X contained in said counterclaim, denies each and every, all and singular the allegations therein contained.

Wherefore, plaintiff prays judgment as follows:

1. That defendant take nothing by its counterclaim on file herein.

2. That the plaintiff have judgment as prayed for in his complaint on file herein.

3. And for such other and further relief as to the Court shall seem meet and proper.

/s/ JOHN A. BOHN,

/s/ ROBERT E. DUFFY,
Attorneys for Plaintiff
and Cross-Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 19, 1955.

[Title of District Court and Cause.]

PRETRIAL ORDER

JOHN A. BOHN, and
ROBERT E. DUFFY,
Attorneys for Plaintiff;

FINTON J. PHELAN, JR., ,
Attorney for Defendant.

January 26, 1955, at 9:30 A.M.

I. Pleadings:

Plaintiff's complaint as amended alleges that the plaintiff and defendant entered into a co-partnership agreement under date of June 23, 1952, under the terms of which the parties were to operate an ice cream business in Guam to be known as the Dairy Queen of Guam; that contrary to the agreement the defendant took arbitrary possession of the books and assets of the business on or about April 4,

1953, and continued to operate the same and continues to deny that the plaintiff is a co-partner in the business. The plaintiff prays judgment for the appointment of a receiver, a partnership accounting and other relief.

After numerous motions were disposed of the defendant filed its answer and cross-complaint and alleges that it took possession of the books and assets for the reason that its board of directors had not ratified the partnership agreement. It sets up further defenses and filed a counter-claim in which it alleges in effect that due to the plaintiff's failure to operate the business satisfactorily additional profits had been lost and it became necessary for the defendant to take over the business and to offer to return plaintiff's investment.

The plaintiff filed a reply to the counter-claim in the nature of a general denial.

II. Conference:

At the pretrial conference neither of the parties was in a position to supply the court with information sufficient to draft a comprehensive pretrial order since neither was familiar with the full operation of the business and a comprehensive audit had not been made. In general, however, it appeared that the defendant was interested in establishing a retail outlet for the sale of an ice cream mix involving its formula and the use of its patented equipment. It had attempted to construct a building for

such purpose on leased land, which was nearing completion, but was confronted with a shortage of capital and adequate local management. The plaintiff at the time the partnership agreement was entered into was operating a number of successful businesses in Guam through a corporation known as Pacific Enterprises, Inc., of which corporation he was the majority stockholder. In reliance, in large part, upon his managerial ability and the availability of his organization, plus his capital investment, the defendant entered into a partnership agreement with him. He immediately began the process of completing the building for opening and supplied employees for such purpose, but shortly after the business was begun he left for the United States and did not return to Guam for a period of approximately two years. The plaintiff relied upon various members of his organization to provide management and all services, a part of which were duly reimbursed. In a companion case to this, *Pacific Enterprises, Inc., vs. the partners doing business under the firm name and style of Dairy Queen of Guam*, the plaintiff in that action, No. 68-54 in this court, seeks to obtain reimbursement for corporate expenditures made for the benefit of the partners as shown by its open account.

The defendant contended that due to the prolonged absence of the plaintiff the business was improperly managed and that after making repeated efforts to induce him to return to Guam and to manage the business, it became necessary for the defend-

ant to take over the books and assets of the business and that it thereupon notified the plaintiff that defendant's board of directors had never ratified the partnership agreement and that the plaintiff's investment in the amount of \$15,000 would be returned to him. It is conceded that the defendant acted *ex parte* and did not seek the dissolution of the partnership agreement through court action.

It appears from the defendant's answer and cross-complaint that during the period from the entering into of the partnership agreement until the defendant took over the business, the business made a gross profit during the period when it was under the control of the plaintiff in excess of \$81,000.

III. Witnesses for the Plaintiff:

1. The plaintiff will testify as to the execution of the partnership agreement, the payment of his capital contribution, his efforts to establish the business and his failure to receive his share of the profits.

2. Henry Diza, accountant for Pacific Enterprises, Inc., will testify that he kept the books of the partnership business until about June 1, 1953, when they were delivered to the defendant.

3. Joseph Mego will testify that he worked part-time as manager of the business, supervising the delivery of supplies and the general operation until the business was taken over by the defendant.

4. G. C. Balmonte will testify as to the services

made available by himself and others in the operation of the business.

5. Robert Miller or some other accountant to be selected will testify as to the audit of the books.

6. Lyle Turner, a lawyer, will testify as to the circumstances surrounding the entry into the agreement and various admissions made by the defendant as to the operation of the business.

IV. Witnesses for the Defendant:

1. Edward Thompson, the president of the defendant corporation, will testify as to the circumstances surrounding the making of the agreement, his efforts to induce the plaintiff to return to Guam and to manage the business, the general failure to have the business managed properly and the necessity for taking it over.

2. Norman Thompson, the son of Edward Thompson, will testify that he took over the business and the books approximately June, 1953, and the conditions he found in the course of his management of the business.

3. Two employees, names not stated, will testify as to their employment and the inadequate operation of the business.

V. Stipulations:

It is stipulated:

1. Either party may introduce additional witnesses by giving the opposing party written notice

at least five days before trial with an outline of the testimony to be given by such witness.

2. Civil case No. 68-54, Pacific Enterprises, Inc., vs. the partners in this action, shall be consolidated for trial and any material evidence introduced in this action may be considered in determining Civil No. 68-54.

VI. Issues for Trial:

1. Whether the defendant was warranted in interfering with the operation of the business.

2. Whether the defendant has received partnership funds for which it must account to plaintiff.

3. Whether the defendant can rely upon any defense that the partnership agreement was not ratified by its board of directors.

4. Whether it is necessary for the court to appoint a receiver for the operation of the business pending dissolution of the partnership.

VII. Order: It Is Herewith Ordered:

1. The above-entitled action is set for trial February 14, 1955, at 9:30 a.m.

2. The action in Civil Case 68-54, Pacific Enterprises, Inc., vs. these parties, is consolidated with this action for purposes of trial and any evidence material to the issues introduced in the trial of the present action may be considered as having been introduced in connection with the trial of 68-54.

Dated and entered this 26th day of January, A.D. 1955.

/s/ PAUL D. SHRIVER,
Judge.

Approved:

/s/ JOHN A. BOHN,
Attorney for Plaintiff.

/s/ F. J. PHELAN, JR.,
Attorney for Defendant.

[Endorsed]: Filed January 26, 1955.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS

To: John Bohn and Robert Duffy, Esquires, Attorneys for Plaintiff, Agana, Guam.

Please take notice that the defendant, American Pacific Dairy Products, Inc., hereby requests the plaintiff, Joseph A. Siciliano, pursuant to Rule 36 of the Federal Rules of Civil Procedure, to admit, within ten (10) days after service of this request, for the purpose of the above-entitled action only, and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. That prior to the opening of the Dairy Queen of Guam for business, Joseph A. Siciliano provided no services and did no work at the Dairy Queen of Guam.

2. That on the opening day of the Dairy Queen of Guam, Joseph A. Siciliano did nothing other than wait on the counter at the Dairy Queen of Guam.

3. That Joseph A. Siciliano left Guam within ten (10) days of the opening of the Dairy Queen of Guam, and was absent for a period of two (2) years.

4. That Joseph A. Siciliano established a permanent residence in the State of Nevada during his absence.

5. That during the absence of Joseph A. Siciliano, he never visited Guam even for a temporary period.

6. That Joseph A. Siciliano executed no contract on behalf of the Dairy Queen of Guam with Pacific Enterprises, Inc.

7. That Joseph A. Siciliano placed no orders on behalf of the Dairy Queen of Guam with Pacific Enterprises, Inc.

8. That Joseph A. Siciliano is the sole owner of that corporation known as Pacific Enterprises, Inc.

9. That Joseph A. Siciliano did not advise the defendant herein of his sole ownership of Pacific Enterprises, Inc.

10. That Henry Diza is an alien contract employee of Pacific Enterprises, Inc.

11. That Henry Diza is not an officer of Pacific Enterprises, Inc.

12. That Henry Diza was never an officer of Pacific Enterprises, Inc.

13. That Joseph A. Siciliano or Pacific Enterprises, Inc., were never authorized by the United States Immigration and Naturalization Service to work contract alien employees of Pacific Enterprises, Inc., at the Dairy Queen of Guam.

14. That Joseph A. Siciliano owns or controls all the outstanding stock of Pacific Enterprises, Inc.

15. That employees of Pacific Enterprises, Inc., removed from the Dairy Queen of Guam, 2,500 pounds of frozen strawberries, 50 gallons of vanilla extract, sheets of plywood and other building materials, certain motors and condensers and other equipment from the air conditioning plant of the Dairy Queen of Guam.

16. That at the time of entering into the agreement with Mr. Edward Thompson, Joseph A. Siciliano was advised that the agreement was subject to ratification by the Board of Directors of American Pacific Dairy Products, Inc.

17. That Joseph A. Siciliano has part of the business records of the Dairy Queen of Guam for the period July, 1952 through April, 1953.

18. That Joseph A. Siciliano never made a complete accounting of the the funds and business of the Dairy Queen of Guam for the period June, 1952 through April, 1953.

19. That during the period June, 1952 to April, 1953, the agents and servants of Joseph A. Siciliano:

a. Did not maintain daily, weekly or monthly inventories.

b. Did not preserve the daily tapes from the cash register.

c. Did not daily or weekly deposit funds of the Dairy Queen of Guam in the bank account.

d. Frequently and as a regular course of business paid all bills of the Dairy Queen of Guam by cash payment.

20. That during the period June, 1952, to April, 1953, Wallace Veit did not work at the Dairy Queen of Guam.

21. That Pacific Enterprises, Inc., submitted no statement or bill to the Dairy Queen of Guam until the year 1954.

22. That the Dairy Queen of Guam never rented a reefer truck from Pacific Enterprises, Inc.

23. That Pacific Enterprises, Inc., did not issue the Dairy Queen of Guam any supplies.

24. That the Dairy Queen of Guam never used eight ounce (8 oz.) size Lily Cups.

Dated at Agana, Guam, this 2nd day of February, 1955.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant.

FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 2, 1955.

In the District Court of Guam, in and for the
Unincorporated Territory of Guam.

Civil Action No. 59-54

JOSEPH A. SICILIANO,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS,
INC., a Corporation,

Defendant.

Civil Action No. 68-54

PACIFIC ENTERPRISES, INC.,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS,
INC., and JOSEPH SICILIANO, Co-Partners
Doing Business Under the Firm Name and
Style of DAIRY QUEEN OF GUAM,

Defendants.

AMENDED CROSS-COMPLAINT IN
CIVIL No. 59-54

The defendant, for amended cross-complaint
against plaintiff, alleges as follows:

1. Adopts and realleges paragraphs I, II, III, IV, V, VI, VII, VIII, and X of the cross-complaint.
2. Amends the allegations contained in paragraph IX of the cross-complaint as follows:

The defendant suffered irreparable harm and injury to its business on account of the failure of the plaintiff under the de facto partnership heretofore operating to perform any personal service whatsoever or devote any of his personal knowledge, skill or energy to the business. If properly managed and directed the business from the existing store would have amounted to gross sales in the amount of One Hundred Four Thousand Five Hundred Six and 65/100 Dollars (\$104,506.65) during the period from June 23, 1952, to April 30, 1953. Because of lack of adequate and proper management and due to unnecessary and needless expenses, the total gross sales of the existing store were only Eighty-one Thousand Three Hundred Sixty-one and 03/100 Dollars (\$81,361.03) during this period. Because of the plaintiff not being available and not devoting his personal knowledge, skill and energy to the management of the existing store, and because the plaintiff did not open two new stores as projected and planned in the meetings of June, 1952, the defendant suffered a total loss of gross sales of at least Forty-five Thousand Seven Hundred Seventy-one and 94/100 Dollars (\$45,771.94). The responsibility for the management and supervision of the business during this period was that of the plaintiff and he failed completely to discharge that responsibility. Defendant not only performed everything agreed to by it but also defendant's President personally went to Guam to straighten out the business and preserve the investment. As plaintiff has performed no services whatsoever to the de facto part-

nership, the defendant alleges that plaintiff should not be entitled to any of the net profits therefrom and should account fully for all funds received by him from June 23, 1952, to May 12, 1953.

Wherefore, defendant prays for judgment against the plaintiff as follows:

1. For an order confirmed the termination of the de facto partnership heretofore existing between plaintiff and defendant with regard to "Dairy Queen of Guam" as of May 12, 1953.

2. For an order affirming the defendant's right, title, and interest as the sole owner of the "Dairy Queen of Guam."

3. That the plaintiff account for all monies received during the de facto partnership in the operation of "Dairy Queen of Guam."

4. That the Court decree that the plaintiff receive the original Fifteen Thousand Dollars (\$15,000.00) investment which he made in the business, less any amounts to which the defendant may be entitled under the accounting prayed for in paragraph 3, and less damages in the sum of Forty-five Thousand Seven Hundred Seventy-one and 94/100 Dollars (\$45,771.94) which the defendant has suffered because of plaintiff, including in addition the costs, disbursements, and attorney fees in this action; and further that the defendant receive all the remaining profits and capital interests of "Dairy Queen of Guam."

5. Such other and further relief as the Court may deem proper and lawful.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy
Products, Inc.

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy
Products, Inc.

[Endorsed]: Filed February 9, 1955.

[Title of District Court and Causes.]

Civil Action Nos. 68-54 and 59-54

DEMAND FOR JURY TRIAL

The defendant, American Pacific Dairy Products, Inc., requests the Court to direct a jury trial of the issues raised by the complaint and the answer filed by this defendant and the issues raised by the counter-claim filed by this defendant, and a jury trial upon the issues raised by the cross-complaint against the co-defendant, Joseph Siciliano, filed by this defendant.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy
Products, Inc.

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,

Attorney for Defendant, American Pacific Dairy
Products, Inc.

[Endorsed]: Filed February 9, 1955.

[Title of District Court and Cause.]

Civil Case No. 59-54

OBJECTIONS AND ANSWERS TO
REQUESTS FOR ADMISSIONS

Plaintiff herewith presents proposed answers to some of defendant's requests for admissions and his objections to the remainder of said requests as follows, to wit:

I.

That all of defendant's requests for admissions are wholly improper and not timely in that on the 20th day of January, 1955, a pre-trial hearing was had on this case pursuant to an order of the District Court of Guam and that at that time the defendant was given an opportunity to request admissions of facts and of documents, but did fail absolutely and entirely to do so; that the scope of the issues in the case were set in the aforementioned pre-trial hearing, and to permit the requests of defendant for admissions at this time would serve to expand the pre-trial order, result in unnecessary delay and violate the reasons and purposes for a pre-trial hearing.

II.

That the pre-trial order of the Honorable Judge Schriver in the District Court of Guam for the territory of Guam, having been issued on the 26th day of January, 1955, and thereafter not having been objected to by either party to this action, controls the subsequent course of this action, unless within the discretion of the Court it shall otherwise be amended at the time of trial.

III.

That the defendant has had ample opportunity to avail itself of the procedures provided for in Rule 36 of the Federal Rules of Civil Procedure pertaining to requests for admission, and has earlier neglected and refused to do so; that at this time, subsequent to the pre-trial hearing and pre-trial order of the District Court, shortly before the time set for the trial of the action upon its merits the request of the defendant for admissions places an onerous and unfair burden upon the plaintiff.

IV.

That all of the facts for which admissions are requested are controversial facts disputed by the plaintiff, and that the proper procedure to elicit such information is through discovery methods set forth in the Federal Rules of Civil Procedure and not by requests for admissions.

V.

Plaintiff herein for further objection to the requests for admissions served by defendant, states

that he is unable and unwilling to admit the truth of certain requested facts and for the reasons set forth below cited to each fact requested, objects as follows:

(1) That question No. 1 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(2) That question No. 2 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(3) That question No. 3 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partner-

ship violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(4) That question No. 4 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(5) That question No. 5 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(6) That question No 6 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract

of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(7) That question No. 7 is irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the court are simple and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(8) In answer to question No. 8, plaintiff denies that Joseph A. Siciliano is the sole owner of Pacific Enterprises, Inc., but states that as of the dates material to this action he did own all of the shares of the corporation except a few qualifying shares, and further admits that for the purposes of this case only, that he owned, controlled, dominated and was the alter ego of the corporation named in said question.

(9) That question No. 9 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract

of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(10) That question No. 10 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(11) That question No. 11 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(12) That question No. 12 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court

are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(13) That question No. 13 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(14) In answer to question No. 14, plaintiff denies that Joseph A. Siciliano is the sole owner of Pacific Enterprises, Inc., but states that as of the dates material to this action he did own all of the shares of the corporation except a few qualifying shares, and further admits that for the purposes of this case only, that he owned, controlled, dominated and was the alter ego of the corporation named in said question.

(15) That question No. 15 is irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the

court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(16) That question No. 16 is irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(17) Plaintiff denies that he has any of the business records of the Dairy Queen of Guam for the period of July, 1952, through April, 1953.

(18) That question No. 18 is irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending

an accounting and order for dissolution? That the said request for admission is not pertinent to these issues, and that question No. 18 is further improper in that it is ambiguous and misleading and is one of the controversial facts in issue at the trial.

(19) That questions Nos. 19 a, 19 b, 19 c, and 19 d are irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (1) Whether or not a contract of co-partnership was entered into by the parties? (2) Was the contract of co-partnership violated? (3) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues, and that questions Nos. 19 a, 19 b, 19 c, and 19 d are further improper in that they are ambiguous and misleading and are among the controversial facts in issue at the trial.

(20) That question No. 20 is irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(21) That question No. 21 is irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(22) That question No. 22 is irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

(23) That question No. 23 is irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the

said request for admission is not pertinent to these issues.

(24) That question No. 24 is irrelevant, immaterial and outside the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not a contract of co-partnership was entered into by the parties? (b) Was the contract of co-partnership violated? (c) Should a receiver be appointed to take charge of the business pending an accounting and order for dissolution? That the said request for admission is not pertinent to these issues.

/s/ JOSEPH A. SICILIANO.

Subscribed and Sworn to before me this 9th day of February, 1955.

[Seal] /s/ E. L. COREFELL,
Notary Public in and for the
Territory of Guam.

My commission expires 27 July, 1955.

[Endorsed]: Filed February 10, 1955.

In the District Court of Guam in and
for the Territory of Guam

Civil Action No. 59-54

JOSEPH A. SICILIANO,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS,
INC., a Corporation, et al.,

Defendants.

· INTERLOCUTORY JUDGMENT

This cause came on regularly for trial before the Court sitting without a Jury on the 14th day of February, 1955, Messrs. John A. Bohn and Robert E. Duffy appeared as attorneys for the plaintiff, and Finton J. Phelan, Jr., Esq., appeared as attorney for the defendant, and the Court having heard the testimony and having examined the proofs offered by the respective parties and being fully advised in the premises and having directed that an interlocutory judgment be entered; now, therefore, by reason of the law and the facts aforesaid:

It Is Ordered, Adjudged and Decreed:

1. That the partnership or joint venture heretofore existing between the plaintiff and the defendant under the firm name and style of Dairy Queen of Guam, be and the same is hereby dissolved.

2. That the plaintiff is entitled to an accounting from the defendant but that the Court takes under advisement the period of time which said accounting should cover, and upon final determination of this matter the Court will make a supplementary order fixing said time and will make such further orders as it deems appropriate as to the disposition of the assets of the partnership or joint venture.

3. That all of the assets of the defendant are hereby placed in the custody of the Court and that Norman Thompson be, and he is hereby appointed Trustee for the Court, to take possession of and to manage and operate the business of the Dairy Queen of Guam under the direction of the Court and subject to such further orders and accountings as may from time to time be required by the Court.

4. That the said Trustee shall continue to operate the business of the Dairy Queen of Guam, provided that all funds of said business now existing or hereafter received shall be impounded in the Agana Branch of the Bank of America National Trust & Savings Association, and withdrawn only for necessary operating expenses of the business.

5. That the defendant and all of its officers, agents and employees be and they are hereby enjoined and restrained from disposing of any of the assets of the defendant including its holdings and interest in a corporation known as Guam Frozen Products, Inc.

6. That unless the parties within five (5) days of the date hereof agree upon a mutually satisfac-

tory accountant to audit the books of the defendant, that the Court will thereafter appoint such an accountant to perform such audit.

7. That the defendant is hereby ordered to produce all of its books, records and papers wherever the same shall be located for the purpose of facilitating and completing the accounting herein provided for.

Dated this 18th day of February, 1955.

/s/ PAUL D. SHRIVER,
Judge of the District Court.

[Endorsed]: Filed February 18, 1955.

[Title of District Court and Cause.]

Civil Case No. 59-54

OPINION

JOHN A. BOHN, and
ROBERT E. DUFFY,
Attorneys for Plaintiff.

FINTON J. PHELAN, JR.,
Attorney for Defendant.

The plaintiff began his action against the defendant for the appointment of a receiver and for a partnership accounting. On June 23, 1952, the plaintiff was a resident of Guam and was president of a Guam corporation known as Pacific Enter-

prises, Inc., of which corporation he was the owner of nearly all except qualifying shares. Because of his energy and business acumen he was recognized as a very successful businessman.

The defendant is a corporation organized and existing under the laws of the State of Washington. Its president, Edward Thompson, together with associates, had caused the corporation to be organized primarily for the purpose of opening a store in Guam to sell at wholesale and retail ice cream products through the use of a patented process. He came to Guam where he contacted the plaintiff. The plaintiff showed him many business courtesies and agreed to act as the corporation's resident agent. At that time there was some discussion of the plaintiff's buying an interest in defendant's business, but the plaintiff expressed the view that the percentage offered him was not sufficient to interest him. The defendant obtained a lease and proceeded to construct its store to be known as the "Dairy Queen." It employed a part-time manager for this purpose.

As the store was nearing completion in June, 1953, Edward Thompson again came to Guam and learned that the part-time manager would not be available. As he was impressed with plaintiff's business ability, he offered, and the plaintiff accepted, a 50 per cent interest in the business. Thompson, acting for the defendant corporation, entered into a co-partnership agreement with the plaintiff under the terms of which each partner

paid into the partnership \$15,000.00 in cash or other assets. This agreement was entered into June 23, 1952, and the partnership was to be known as Dairy Queen of Guam with expansion as the partners might agree upon. The agreement provided that the plaintiff was to receive a salary during the period that he acted as manager of the partnership with an increase in salary if a second outlet should be opened. The agreement provided that the defendant would have its officers, agents and employees devote such time as might be mutually agreed upon between the partners and the plaintiff agreed to devote such time as might be mutually agreed upon, "together with his skill and energy, to the best interest of the business of the partnership." (Underscoring supplied.)

Coincident with the partnership agreement, a second agreement was entered into under the terms of which the defendant transferred its interests to the partnership and the partnership agreed to pay off, in addition to capital investment, an amount of \$8,026.00 to the defendant. The agreement also provided that plaintiff could participate in any business developed in Okinawa. The lease on the land was duly assigned to the partnership, and the partners executed and filed their certificate of co-partnership for transacting business under a fictitious name.

As of the time these agreements were entered into the situation was perfectly clear. The defend-

ant needed the plaintiff to manage its store in which it had invested nearly all of its corporate capital. In turn the defendant was given the opportunity to invest in what proved to be a very profitable business. For his \$15,000.00 and an additional \$4,000 to be paid out of profits he received a fifty per cent interest in a now and challenging business enterprise along the lines of his business experience and aptitude. The salary to be paid to him was a liberal one in view of the time he would be required to spend in management, and in turn the defendant was satisfied that managerial responsibilities were in competent hands. The plaintiff immediately assumed his managerial responsibilities and in addition to his personal services used employees of Pacific Enterprises, Inc., to complete the store for opening and operation. Thompson left Guam two or three days after the agreements were executed.

But the plaintiff became involved in domestic difficulties and left Guam about a week after the agreements were executed. He left instructions with the management personnel of Pacific Enterprises, Inc., to carry on the partnership business in addition to their other duties, but before leaving he arranged for the construction of a building in connection with the partnership store for the sale of sandwiches and soft drinks. He contended that this was built with Thompson's knowledge and consent as part of the partnership, but Thompson denied this. In a companion case, Pacific Enterprises, Inc.,

vs. the partners, the court wrote down the value of this building to correspond to what the court considered its value to the partnership since it was never used for its intended purpose. In that case Pacific Enterprises, Inc., was given judgment for amounts expended by it for the partnership including the reduced cost of the building.

Upon reaching San Francisco in July, 1952, the plaintiff telephoned Thompson and informed him that he would be gone from Guam for about two months, but in actuality he did not return for about two years. However, the partnership business was carried on by the employees of Pacific Enterprises, Inc. Funds were forwarded to Thompson. Books were kept and reports accepted by the defendant which indicate that during the first year of operation the business made a gross profit equal to the entire capital investment of the partners. Thompson was in contact with the plaintiff and made every reasonable effort to induce him to return and no action was taken to liquidate the partnership until many months after this situation was known to exist; then the defendant indulged in what the court characterized as a "fiction" and attempted to nullify the agreements upon the ground that its board of directors had not ratified them. The defendant took full advantage of the services being performed by Pacific Enterprises, Inc., and accepted the benefits of a successful operation; it has not accounted for any profits during such period. The contention that the agreements were not ratified is disposed of in a let-

ter written by Thompson to plaintiff's representative in Guam under date of October 9, 1952 (Plaintiff's Exhibit No. 7) in which he advised that the agreements had been approved with certain qualifications to help the plaintiff in his troubles.

In April, 1953, Thompson sent his son to Guam with instructions to assist Pacific Enterprises, Inc., or more specifically, its officers and employees who were managing the partnership business. But the conditions under which the business was being operated were such that the son took over the management of the partnership and its existing records. Among such conditions were:

(a) The sanitary conditions at the store were not good.

(b) The cash receipts were not deposited daily but the bags containing returns were kept in the safe with Pacific Enterprises' funds, oftentimes in large amounts.

(c) The books for the partnership had not been posted for a long period of time; consequently monthly reports were delayed.

(d) There was an intermingling of accounts in that Pacific Enterprises, Inc., was furnishing supplies and services for which no charges were currently being posted as debits against the partnership.

(e) The store was being operated irregularly with insufficient controls.

(f) In addition to the foregoing the evidence showed that a cash register had broken down and was not replaced or repaired for a long period of time.

The defendant then abandoned its efforts to get the plaintiff to return and took exclusive control of the partnership business. As of July 1, 1953, it had taken full control, had established its own set of books and was operating the business as a sole corporate enterprise. The record does not show that the plaintiff objected to this, nor does it show that the defendant made reports or in any way treated the plaintiff as a partner after that date. The plaintiff delayed until September, 1954, to begin his action.

The plaintiff contends that the partnership agreement did not require him to act as manager but merely provided for his compensation while employed as manager. While it is true that the agreement could be more explicit, no provision is made in the agreement for any other manager or for selecting any other manager. The plaintiff was in Guam; Thompson was to be in Seattle, Washington. The entire agreement contemplated that the defendant relied upon the plaintiff to provide his services and initiative in carrying on the business. This is further evidenced by paragraph 13 (a) of the agreement which provides that the salary of the plaintiff should cease at the time of his death. It is inconceivable that if the plaintiff was not obligated to manage the business that no provision

would have been made for the appointment of another manager. While the agreement makes provision for the withdrawal of a partner, neither of the parties attempted to follow these provisions. This court is of the view that while no damages were shown as a result of the breach, the plaintiff breached his agreement as of July 1, 1952, but continued as a full partner until July 1, 1953, when the defendant excluded him and took over the business.

The court first concludes that it has jurisdiction over the parties and the subject matter. The court is not concerned as to whether the partnership agreement was ultra vires the powers of the defendant:

Even where a corporation is without authority under its charter to form a partnership with another it may be held liable as a partner to prevent injustice. *Mervyn Investment Co. vs. Biber*, 184 Cal. 637.

In the court's view whether this was a partnership or a joint venture, the rights of the parties are governed by Section 2432, Civil Code of Guam.¹

¹Section 2432. Rights of partners to application of partnership property.

(1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to dis-

This section was taken from the Civil Code of California and now appears as Section 15038 of the Corporation Code of California. As such it may be construed in the light of California decisions, at least those in existence when the provision was adopted, *United States vs. Johnson*, 9 Cir., 181 F. 2d 577. The leading California case is *Zeibak vs. Nasser*, 12 C. 2d 1, which was decided after the adoption of the Guam codes but involved a joint venture entered into before such adoption. It is

charge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement, and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under Section 2430, paragraph (2), he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is cause in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have:

I. All the rights specified in paragraph (1) of this section, and

II. The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property; provided they secure the payment by bond approved by the court,

recognized that while subsequent California decisions do not necessarily control, *Anderson vs. United States*, 9 Cir., 157 F. 2d 429, it is believed that the decision correctly states the law, regardless of when it was handed down. The following general principles are taken from the syllabus:

(2) Joint Ventures—Statutory Construction. The rights and liabilities of joint adventurers, as between themselves, are governed by the same principles which apply to a partnership; and section 2432 of the Civil Code, which relates to the rights of part-

or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2) (a) II of this section, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:

I. If the business is not continued under the provisions of paragraph (2) (b) all the rights of a partner under paragraph (1), subject to clause (2) (a) II of this section.

II. If the business is continued under paragraph (2) (b) of this section the right as against his co-partners and all claiming through them in respect of their interests in the partnership to have the value of his interest in the partnership less any damages caused to his co-partners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good will of the business shall not be considered.

ners on dissolution, is not confined in operation to partnerships, but is applicable in the case of dissolution of joint ventures.

(5) Dissolution—Wrongful Conduct—Statutory Construction.

Section 2432 of the Civil Code, which provides the rights and remedies of the partners when a dissolution has been effected because of the wrongful conduct of one of the partners, is applicable even though the actual dissolution is effected by a decree of court, when such dissolution is caused by the wrongful conduct of a partner in contravention of the partnership agreement, and the court decrees the dissolution because of such wrongful conduct.

(8) Remedies—Procedure—Statutory Construction—Due Process—Constitutional Law.

Section 2432 of the Civil Code, relating to the rights of partners on dissolution, is purely remedial in that it provides for a mode of procedure which a partner must be deemed to have consented to when he entered into his undertakings; and in said action, where plaintiff was afforded the right to have his cause tried and determined under the same rules of procedure that are applied to similar actions brought pursuant to the Uniform Partnership Law, and he invoked the process of the law himself, he could not complain that his property was taken from him without due process of law under said act, in that he was denied one-half the value of the good will.

The Zeibak case involved a joint venture. Zeibak put up part of the capital but the Nassers at all times managed the venture. The trial court held that Zeibak had violated the joint venture agreement, but held that he was entitled to his interest as of the date of the court's decree of dissolution; the Nassers contended that Zeibak's interest should have been determined as of the date of his breach. In affirming the trial court, the court said, p. 16:

“Although this finding might well have been more clearly phrased, any apparent ambiguity therein is completely dispelled by the words of the trial court just referred to. Throughout the findings, conclusions of law, and into the final judgment the trial court consistently adhered to the date July 20, 1934, as the date upon which plaintiff's interest should be ascertained. Furthermore, it may be said that after December 11, 1932, the acts and conduct of the defendants were wholly inconsistent with a recognition upon their part that they considered the venture had been dissolved ipso facto as of that date. Notwithstanding the fact that on one occasion the defendants informed plaintiff that they considered he had breached the partnership agreement by his failure to sign the agreement upon that day, up to the date of trial, the parties continually negotiated, each with the other, looking to a settlement of their differences, and during the entire time, to all intents and purposes they resumed and continued the partnership relation.”

In the instant case just the opposite is true. The plaintiff, having breached his agreement, forced the defendant to protect itself by taking over the partnership assets. Prior to this step the defendant had made every reasonable effort to induce the plaintiff to comply and to leave the door open for his return. But having taken the step, under what the court considers the erroneous assumption that the plaintiff had never been a partner, the business was operated by the defendant to the complete exclusion of the plaintiff. The defendant caused a second store to be opened and purchased 70 per cent of the stock in the local corporation formed for such purpose, using partnership funds for such purpose but taking the stock in defendant's name. While, as pointed out previously, the defendant did not show damage as a result of the plaintiff's breach since the business prospered, it is entirely within the realm of conjecture as to whether greater profits would not have been made if the plaintiff had been present to manage the operation.

The court therefore is of the view that the parties dissolved their partnership as between themselves on July 1, 1953, and that the plaintiff's interests should be determined as of that date without reference to the value of the good will of the business. But since the defendant continued to use the profits and capital investment of the plaintiff for its own purposes it would seem that the plaintiff is entitled to interest on the amount found to be due him on July 1, 1953, at six per cent per annum until paid. The evidence

shows that the business continued to make a profit until September, 1954, when the plaintiff began his action.

Counsel for the plaintiff shall prepare findings and conclusions and settle with counsel for defendant in 20 days, together with an appropriate decree and order for determining the plaintiff's interests consistent with the opinion.

Dated and entered this 2d day of March, A.D. 1955.

/s/ PAUL D. SHRIVER,
Judge.

[Endorsed]: Filed March 2, 1955.

[Title of District Court and Cause.]

Civil No. 59-54

NOTICE OF APPEAL

Notice is hereby given that American Pacific Dairy Products, Inc., a corporation, the defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the interlocutory judgment and restraining order entered in this action on the 18th day of February, 1955.

Dated at Agana, Guam, this 17th day of March, 1955.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy
Products, Inc.

/s/ FINTON J. PHELAN, JR., For
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy
Products, Inc.

[Endorsed]: Filed March 19, 1955.

[Title of District Court and Cause.]

Civil No. 59-54

SUPPLEMENTAL FINDINGS OF FACT
AND CONCLUSIONS OF LAW

1. The court's memorandum opinion was filed March 2, 1955, and the court adopts such memorandum opinion as its findings of fact and conclusions of law as supplemented herein.

2. The bookkeeper for Pacific Enterprises, Inc., prepared monthly financial statements, cumulative in nature, in accordance with defendant's instructions, and the defendant accepted such statements as being correct.

3. The financial statement from June 22, 1952, to May 31, 1953, showed a cumulative net profit to the partnership of \$31,403.47.

4. During the month of June, 1953, the business was under the control of the defendant and the defendant did not submit a financial statement for such month which would be accepted as accurate.

The average net profit per month was approximately \$2,850.00. It is considered that with increased cost due to the manager, the net profit for the month of June, 1953, was \$2,350.00, or a total undistributed net profit as of July 1, 1953, of \$33,753.49.

5. In the case of Pacific Enterprises, Inc., vs. American Pacific Dairy Products, Inc., and Joseph Siciliano, Civil No. 68-54, which was consolidated for trial with the present case, the court entered judgment for the plaintiff in the amount of \$6,534.55, representing the cost of materials, services and supplies furnished to the partnership. Of this amount \$2,300.00 represented the value to the partnership of a building constructed adjacent to the partnership building on land leased to the partnership, but the value of such building was not carried on the partnership books. An additional amount of \$1,234.95 represented quarters and board for partnership employees furnished subsequent to July 1, 1953.

6. That in addition to the initial capital investment of the partners, there was an account owing to a contractor for the construction of the partnership building in the amount of \$8,000.00, and the partners agreed that this amount was to be paid out of the profits of the business. Such amount was paid out of gross profits and the capital assets increased by such payment. Depreciation on the capital assets was regularly written off in accordance with the partnership agreement.

7. The defendant used capital and profits to invest in a corporation known as Guam Frozen Products, Inc., which was competitive to the partnership, subsequent to July 1, 1953, without plaintiff's knowledge or permission and no effort was made by either partner to dissolve the partnership in accordance with the partnership agreement.

8. The plaintiff was excluded from any voice in or management of the partnership business as of July 1, 1953, and it is not practical to permit dissolution of the partnership to be delayed since the partnership agreement contains no termination date.

9. The defendant offered no evidence in support of its counterclaim and such counterclaim should be dismissed.

10. At the time the plaintiff was excluded from the partnership, as of July 1, 1953, he was entitled to the following:

(a)	Return of Capital.....	\$15,000.00
(b)	Capital improvements paid out of profits	4,000.00
(c)	One-half value of additional building	1,150.00
(d)	One-half net profit.....	16,876.75
		<hr/>
		\$37,026.75
	Less one-half judgment after deducting \$1,234.95	2,649.80
		<hr/>
	Balance	\$34,376.95

11. The plaintiff is entitled to interest at six per cent per annum on \$34,376.95 for the use of his capital and profits from July 1, 1953, to the date of the entry of judgment.

Conclusions of Law

1. The court has jurisdiction of the parties and the subject matter of the action under Section 1424, Title 28, U.S.C. and Section 62, Code of Civil Procedure of Guam.

2. The partnership of the parties was dissolved by exclusion of the plaintiff because of his breach and acquiescence in such exclusion as of July 1, 1953.

3. The defendant is entitled to no relief under its cross-complaint.

4. The plaintiff is entitled to judgment against the defendant in the amount of \$34,376.95 with interest at six per cent per annum from July 1, 1953, to the date of entry of judgment.

5. The plaintiff is entitled to the appointment of a receiver unless the judgment is paid within 30 days from the entry thereof.

6. Upon payment of the judgment the defendant is entitled to have transferred to it the plaintiff's interest in the leasehold and other assets of the partnership.

Dated and filed this 7th day of April, A.D. 1955.

/s/ PAUL D. SHRIVER,

Judge.

[Endorsed]: Filed April 7, 1955.

District Court of Guam
Territory of Guam

Civil No. 59-54

JOSEPH A. SICILIANO,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS,
INC., a Corporation,

Defendant.

JUDGMENT

The court having heretofore filed its Findings of Fact and Conclusions of Law in the above-entitled action, it is herewith

Ordered, Adjudged and Decreed:

1. The co-partnership or joint venture heretofore existing between Joseph A. Siciliano and American Pacific Dairy Products, Inc., is herewith dissolved as between the parties as of July 1, 1953.

2. The plaintiff, Joseph A. Siciliano, shall have judgment against the defendant, American Pacific Dairy Products, Inc., in the amount of \$34,376.95 with interest at six per cent per annum from July 1, 1953, to April 7, 1955, in the amount of \$3,646.36 and costs of suit in the amount of Sixty and 45/100 Dollars (\$60.45).

3. The defendant shall take nothing by its cross-complaint.

4. The interlocutory judgment heretofore entered shall remain in effect to preserve assets, but if the judgment entered herein is not paid within 30 days from April 7, 1955, the plaintiff, Joseph A. Siciliano, upon application, shall be entitled to a receiver to collect the judgment.

5. The plaintiff, upon payment of the judgment, shall transfer to the defendant all of his interest in the partnership assets, including the leasehold interest.

Dated and entered of record this 7th day of April, A.D. 1955.

/s/ PAUL D. SHRIVER,
Judge.

[Endorsed]: Filed and entered April 7, 1955.

[Title of District Court and Cause.]

Civil No. 59-54

MOTION

The defendant, American Pacific Dairy Products, Inc., a corporation, moves the court to stay the enforcement in the judgment in this action pending the disposition of the defendant's appeal to the United States Court of Appeals for the Ninth Circuit, and for that purpose to fix the amount of the bond required to be filed by the defendant.

Dated at the City of Agana, unincorporated territory of Guam, this 16th day of April, 1955.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant.

LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Defendant.

By /s/ FINTON J. PHELAN, JR.

Approved: for \$40,000.00.

/s/ PAUL D. SHRIVER,
Judge of the District Court of
Guam.

[Endorsed]: Filed April 18, 1955.

[Title of District Court and Cause.]

Civil No. 59-54

NOTICE OF APPEAL

Notice is hereby given that American Pacific Dairy Products, Inc., a corporation, the defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on the 7th day of April, 1955.

Dated at Agana, unincorporated territory of Guam, this 30th day of April, 1955.

/s/ FINTON J. PHELAN, JR.,

Attorney for Defendant, American Pacific Dairy Products, Inc.

/s/ FINTON J. PHELAN, JR., for
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,

Attorneys for Defendant, American Pacific Dairy Products, Inc.

[Endorsed]: Filed April 30, 1955.

[Title of District Court and Cause.]

Civil Number 59-54

SUPERSEDEAS AND COST BOND
ON APPEAL

Know All Men by These Presents:

That We, American Pacific Dairy Products, Inc., above named, as principal, and Hartford Accident and Indemnity Company, a corporation organized under the laws of the State of Connecticut, and authorized to transact the business of surety in the Territory of Guam, as surety, are held and firmly bound unto Joseph A. Siciliano, the plaintiff above named, in the just and full sum of Forty Thousand and No/100 (\$40,000.00) Dollars, for which sum, well and truly to be paid, we bind ourselves, our

and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and Dated this 25th day of April, 1955.

The Condition of This Obligation Is Such, That Whereas, the above-named Joseph A. Siciliano on the 7th day of April, A.D. 1955, in the above-entitled action and court, recovered judgment against the American Pacific Dairy Products, Inc., above named

And Whereas, the above-named principal has heretofore given due and proper notice that it appeals from said decision and judgment of said District Court of Guam to the 9th Circuit Court.

Now, Therefore, if the said principal, American Pacific Dairy Products, Inc., shall pay to Joseph A. Siciliano, the plaintiff above named, all costs and damages that may be awarded against it on the appeal, or on the dismissal thereof, and shall satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment in order which the said 9th Circuit Court may render or make, or order to be rendered or made by said District Court of Guam, then this obligation to be void; otherwise to remain in full force and effect.

AMERICAN PACIFIC DAIRY
PRODUCTS, INC.,

By /s/ GEORGE A. HENRYE,
Vice-President.

[Seal]

HARTFORD ACCIDENT AND
INDEMNITY COMPANY,

By /s/ GERALD L. PERRY,
Attorney-in-Fact.

Approved May 2, A.D. 1955.

/s/ PAUL D. SHRIVER,
Judge.

Hartford Accident and Indemnity Company
Hartford, Connecticut

Power of Attorney

Know all men by these Presents, That the Hartford Accident and Indemnity Company, a corporation duly organized under the laws of the State of Connecticut, and having its principal office in the City of Hartford, County of Hartford, State of Connecticut, does hereby make, constitute and appoint Gerald L. Perry, of Seattle, Washington, its true and lawful Attorney(s)-in-fact, with full power and authority to sign, execute and acknowledge any and all bonds and undertakings on behalf of the Company in its business of guaranteeing the fidelity of persons holding places of public or private trust; guaranteeing the performance of contracts other than insurance policies; guaranteeing the performance of insurance contracts where surety bonds are accepted by states or municipalities, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law

allowed, and to bind the Hartford Accident and Indemnity Company thereby as fully and to the same extent as if such bonds and undertakings and other writings obligatory in the nature thereof were signed by an Executive Officer of the Hartford Accident and Indemnity Company and sealed and attested by one other of such officers, and hereby ratifies and confirms all that its said Attorney(s)-in-fact may do in pursuance hereof.

This power of attorney is granted under and by authority of the following Bylaw adopted by the Stockholders of the Hartford Accident and Indemnity Company at a meeting duly called and held on the 10th day of February, 1943.

Article IV.

Section 8. The President or any Vice-President, acting with any Secretary or Assistant Secretary, shall have power and authority to appoint, for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, one or more Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-fact and at any time to remove any such Resident Vice-President, Resident Assistant Secretary, or Attorney-in-fact, and revoke the power and authority given to him.

Section 11. Attorneys-in-fact shall have power and authority, subject to the terms and limitations of the power of attorney issued to them, to execute

and deliver on behalf of the Company and to attach the seal of the Company thereto any and all bonds and undertakings, and other writings obligatory in the nature thereof, and any such instrument executed by any such Attorney-in-fact shall be as binding upon the Company as if signed by an Executive Officer and sealed and attested by one other of such Officers.

In Witness Whereof, the Hartford Accident and Indemnity Company has caused these presents to be signed by its Vice-President, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 20th day of April, 1948.

[Seal] HARTFORD ACCIDENT AND
 INDEMNITY COMPANY,

/s/ WALLACE STEVENS,
 Vice-President.

Attest:

/s/ D. C. MACKINNON,
 Assistant Secretary.

State of Connecticut,
County of Hartford—ss.

On this 20th day of April, A.D. 1948, before me personally came Wallace Stevens, to me known, who being by me duly sworn, did depose and say: that he resides in the County of Hartford, State of Connecticut; that he is the Vice-President of the Hartford Accident and Indemnity Company, the

[Title of District Court and Cause.]

Civil No. 59-54

NOTICE OF APPEAL

Notice is hereby given that Joseph A. Siciliano, above-named plaintiff, does hereby appeal to the Court of Appeals for the Ninth Circuit from those parts of the final judgment,

(1) That fixed the date of July 1, 1953, as the date of dissolution of the co-partnership and limited the accounting of profits from the defendant to that date,

(2) And that limited plaintiff's recovery to profits of the co-partnership as of July 1, 1953, and failed to award plaintiff a share of profits earned to February 18, 1955, and failed to order sale of co-partnership property and distribution of assets between the parties and allow plaintiff his share therein.

Said final judgment was entered in this Action on April 7, 1955.

/s/ JOHN A. BOHN,
Attorney for Appellant,
Joseph A. Siciliano.

[Endorsed]: Filed May 5, 1955.

[Title of District Court and Cause.]

Civil No. 59-54

ORDER

Taxing Costs

The defendant, American Pacific Dairy Products, Inc., a corporation, having objection to the Bill of costs of plaintiff, the matter coming on for a hearing before the court on Friday the 6th Day of May, 1955, Finton J. Phelan, Jr., Esq., appearing for Defendant and Joseph J. Novak, Esq., appearing for Plaintiff. The Court having considered the matter it is:

Ordered that the following items be allowed.

Filing Fee	\$15.00
Notary Fee	3.00
Marshal's Fee	4.00
Copy of Deposition of Henry Digo.....	7.00
Copy of Deposition of Joseph Siciliano..	9.25
Reporter's Transcript Fee.....	2.20
Statutory Attorney Fees.....	20.00
	<hr/>
Total	\$60.45

That all other items of costs be disallowed and that as herein allowed the clerk insert in the judgment costs in the sum of \$60.45.

Dated this 25th day of May, 1955.

/s/ PAUL D. SHRIVER,

Judge of the District Court of
Guam.

[Endorsed]: Filed May 25, 1955.

[Title of District Court and Cause.]

Civil Action No. 59-54

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the American Pacific Dairy Products, Inc., defendant, the sum of Two Hundred Fifty (\$250.00) Dollars.

The condition of this bond is that, whereas the plaintiff has appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed May 5, 1955, from the judgment of this court entered April 7, 1955, if the plaintiff shall pay all costs adjudged against him if the appeal is dismissed or the judgment affirmed or such costs as the Appellate Court may award if the judgment is modified, then this bond is to be void, but if the plaintiff fails to perform this condition, payment of the amount of this bond shall be due forthwith.

/s/ JOSEPH SICILIANO,
Plaintiff,
Address Tamuning, Guam.

/s/ JAMES W. FERRANTE,
Surety,
Address Tamuning, Guam.

/s/ G. M. O'KEEFE,
Surety;
Address Agana Heights,
Guam.

Signed and acknowledged before me this 31st day of May, 1955.

/s/ [Indistinguishable],

Notary Public in and for the
Territory of Guam.

My commission expires December 13, 1956.

JUSTIFICATION OF SURETIES

Territory of Guam,
Municipality of Agana—ss.

Joseph Siciliano, James W. Ferrante, G. M. O'Keefe, being severally duly sworn, each for himself, doth depose and say, that he is a resident and freeholder within the territory of Guam, and that he is worth the sum of Two Hundred Fifty (\$250.00) Dollars, over and above all of his just debts and liabilities which he owes and has incurred, and his property is exempt from execution.

/s/ JOSEPH SICILIANO,

/s/ JAMES W. FERRANTE,

/s/ G. M. O'KEEFE.

Subscribed and sworn to before me this 31st day of May, 1955.

[Seal] /s/ [Indistinguishable],

Notary Public in and for the
Territory of Guam.

My commission expires: December 13, 1956.

[Endorsed]: Filed June 4, 1955.

[Title of District Court and Cause.]

Civil No. 59-54

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Defendant-Appellant herewith presents the statement of points upon which appellant intends to rely on appeal:

1. The court erred in entering judgment for the plaintiff against the defendant in that said judgment is contrary to the law, contrary to the evidence and is not supported by the weight of admissible evidence.

2. The court committed error in making Supplemental Finding of Fact No. 2 on the ground that said finding is contrary to the evidence.

3. The court committed error in making Supplemental Finding of Fact No. 4, finding that the undistributed net profit as of July 1, 1953, was \$33,753.49, in that said finding is contrary to the law and is not supported by the weight of competent evidence.

4. The court erred in entering Supplemental Finding of Fact No. 5 on the ground that the judgment in the case of *Pacific Enterprises, Inc., vs. American Pacific Dairy Products, Inc., and Joseph Siciliano*, Civil No. 68-54, was contrary to the law, and contrary to the evidence, all as more particu-

larly stated in the designation of points to be relied on in said case.

5. The court erred in entering Supplemental Finding of Fact No. 6 in that it was contrary to the weight of competent evidence and is not supported by the evidence.

6. The court committed error in making Supplemental Finding of Fact No. 10, finding that the plaintiff was entitled to \$34,376.95 as his share in the purported partnership in that said finding is contrary to the law, contrary to the evidence and not supported by the weight of competent evidence, particularly in allowing plaintiff Items b, c, and d and also allowing one-half of the judgment on the ground that the claim of the Dairy Queen for the sum of \$1,066.28 should not be deducted from said judgment, having been included previously in the plaintiff's share of the profit, and also to the allowance of any claim against the defendant.

7. The court erred in entering Supplemental Finding of Fact No. 11 and Supplemental Conclusion of Law No. 4, that the plaintiff was entitled to interest on the amount of \$34,376.95 at the rate of 6% from July 1, 1953, to the date of the entry of this judgment, as such is contrary to the law and to the weight of evidence.

8. The court erred in entering Supplemental Conclusion of Law No. 1 in that said conclusion is contrary to the law.

9. The court erred in holding that the partnership agreement had been ratified by the defendant, as such conclusion is contrary to the law and not supported by the competent evidence in that there is no evidence to support a finding of ratification other than the conditional ratification set forth in defendant's Exhibit E.

10. The court erred in ignoring the separate corporate entity of the defendant corporation and in admitting in evidence plaintiff's Exhibit 7, and in concluding that such exhibit showed corporate ratification.

11. The court erred in concluding that the plaintiff continued as a full partner until July 1, 1953, although he breached the agreement as of July 1, 1952, as such conclusion is contrary to the law and is not supported by the weight of competent evidence.

12. The court erred in entering Supplemental Findings of Fact and Conclusions of Law and Judgment on April 7, 1955, without notice to the defendant, contrary to the terms of the interlocutory judgment entered the 18th day of February, 1955, providing for an accounting between the respective parties.

13. The court erred in denying defendant's motions for change of venue and to dismiss for lack of jurisdiction.

14. The court erred in denying the defendant's demand for a jury trial.

15. The court erred in refusing to grant defendant's motion to dismiss at the end of plaintiff's case.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant, American Pacific Dairy
Products, Inc.

/s/ BURLMAN ADAMS,
LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Defendant, American Pacific Dairy
Products, Inc., Seattle, Washington.

[Endorsed]: Filed June 20, 1955.

[Title of District Court and Cause.]

Civil Action No. 59-54

ANSWERS TO REQUESTS
FOR ADMISSIONS

Comes now the plaintiff and pursuant to the order of the Court, presents herewith his answers to certain questions propounded by defendant:

1. Plaintiff denies the truth of the question asked as No. 1.

2. Plaintiff denies the truth of the question asked as No. 2.

3. Plaintiff admits the truth of the question asked as No. 3.

4. Plaintiff admits that he established a residence in Nevada for divorce purposes but further states that he maintained his home and all of his investments intact in Guam; did intend to return to Guam, and did in fact return to Guam.

5. Plaintiff admits the truth of the question asked as No. 5.

6. Plaintiff admits that he executed no written contract between the Dairy Queen of Guam and Pacific Enterprises, Inc.

7. Plaintiff denies the truth of the question asked as No. 7.

15. Plaintiff denies the truth of the question asked as No. 15.

16. Plaintiff denies the truth of the question asked as No. 16.

17. Plaintiff denies the truth of the question asked as No. 17.

/s/ JOSEPH SICILIANO.

Subscribed and Sworn to before me this 14th day of February, 1955.

[Seal] /s/ E. L. COREFELL,
Notary Public in and for the
Territory of Guam.

My commission expires July 27, 1955.

[Endorsed]: Filed June 23, 1955.

District Court of Guam
Territory of Guam
Civil Case No. 59-54

Before: The Honorable Paul D. Shriver, Judge.

JOSEPH A. SICILIANO,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS,
INC., a Corporation,

Defendant.

TRANSCRIPT OF PROCEEDINGS

February 14, 1955

Appearances:

For the Plaintiff:

JOHN A. BOHN,
Attorney at Law.

For the Defendant:

FINTON J. PHELAN, JR.,
Attorney at Law.

Monday, February 14, 1955, 9:30 A.M.

The Court: First order of business?

The Clerk: Civil Case No. 59-54, Joseph A. Siciliano vs. American Pacific Dairy Products, Inc., coming on for trial with companion case Civil No. 68-54, Pacific Enterprises, Inc., vs. American Pacific Dairy Products, Inc.

The Court: Is the plaintiff ready?

Mr. Bohn: Ready, your honor.

The Court: Defendant ready?

Mr. Phelan: Ready, your honor.

The Court: Both sides answer ready. The plaintiff may proceed.

Mr. Bohn: If your honor please, I would like to make a brief statement to the court in connection with the law involved in this case and for the joint benefit of the court and counsel cite a series of cases upon which we are relying. It was hoped that this would be in typewritten form, a memo to be served to counsel and court, but it was not possible over Sunday to have it typed. May I proceed?

The Court: Yes, proceed.

Mr. Bohn: As your honor is aware there was a partnership agreement signed between a corporation and an individual and the basic effect of that agreement is one of the major issues in this trial. It is the theory of the plaintiff that the action is primarily governed by those provisions of the Civil Code of Guam pertaining to partnerships and we cite particularly [2*] Section 2432 of the Civil Code. That section in general provides for the mechanics of an execution of partnership. We have checked that section and other related sections and proofread them against the California Code sections and find they are identical, and therefore we are citing several cases which have arisen in California involving similar facts and therefore similar law. First of all, where a corporation is without authority to form a partnership with another, it may be held liable as a partner to prevent injustice, *Merwyn Company vs. Bieber*, 184 Cal. 637. We also note that it is a well-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

supported and settled proposition supported by innumerable cases that the rights and liabilities of joint venturers as between themselves are covered by the same rules which apply to partnerships, and it is therefore immaterial whether the agreement be a co-partnership or a joint venture. As a matter of fact the courts have held where for any reason the partnership is imperfect, they hold the transaction to be a joint venture and apply the same rules as they do in the case of a partnership, *Zeibak vs. Nasser*, 12 Cal. 2d, 1. We also cite *Iver vs. Gawn*, 99 Cal. Appellate Division 17. We also cite the various provisions of the New California Digest containing briefs of innumerable cases holding substantially the same. Now in the case of *Zeibak vs. Nasser* which I have just previously cited, the court found specifically that the section of the Code was equally applicable in the case of joint ventures as in the case of a partnership. For that proposition we also cite [3] the following cases: *Cunningham vs. De Mardaigle*, 82 Cal. Ap. 2d, 620—

The Court: What is the citation?

Mr. Bohn: *Cunningham vs. De Mardaigle*, 82 Cal. Ap. 2d, 620. We further cite *McIsaak vs. Pozzo*, 26 Cal. 2d, 809. Now it is the general theory of these cases and our case today that they are distinguished from a partnership repugnant to corporate theory and therefore it has been held that the corporation may enter into such types of ventures under the joint venture theory. We cite the additional case of *Bates vs. Coronado Beach Company*, 109 Cal. 160. It is therefore our theory as to whether it is really a

moot question that a valid partnership existed under this contract, since even though the court may find the corporation unable to enter into such a contract, that the court will find that the corporation is liable under joint ventures in accordance with these cases. We also believe estoppel applicable to a corporation as well as individuals. In other words, when we have a situation where the president of a corporation signs an agreement ostensibly for the corporation, it is true that the president only has such power as has been given by the bylaws and by the board of directors, nevertheless where he exercises it with apparent consent and acquiescence and particularly where the corporation benefits, that corporation is thereby estopped from denying the existence of a binding agreement. In connection with that theory we cite the following cases: *Black vs. [4] Harrison Home Company*, 155 Cal. 121.

The Court: What is that citation again?

Mr. Bohn: *Black vs. Harrison Home Company*, 155 Cal. 121. We also cite for the general proposition that corporations, equally with individuals, are subject to the rule that where with full knowledge of all the facts involved they knowingly accept the benefits of a contract made in their behalf, the acceptance of those benefits themselves constitutes an estoppel to denying a binding contract. To further support that proposition we cite the following cases: *Aigeltinger, Inc., vs. Burke*, 176 Cal. 121; *Gribble vs. Columbus Brewing Company*, 100 Cal. 67; *Newhall vs. Joseph Levy Bag Company*, 19 Cal. Appellate Division 9. We will therefore seek to prove to the

court in this case that the agreements were signed; that they became effective; that the corporation accepted the benefits of the contracts; that either the corporation or its president has received from this venture in excess of the sum of \$100,000, which we require that they account for the same. We will also seek to prove that this corporation took control of the affairs of the Dairy Queen of Guam, which was the business which concerned the partnership contract, and took in excess of \$26,000 of its funds and invested it in another corporation called Guam Frozen Products, Inc., and that they in effect purchased \$17,500 of stock of the corporation and are carrying on their books as an account payable and the difference between that and roughly \$26,000 of the funds have [5] been commingled. We will also seek to prove that the present manager of the Dairy Queen of Guam is acting as manager for the competing corporation and that the present manager of the Dairy Queen of Guam, in fact, is intermingling its supplies, its personnel and its funds with the other corporation. We will ask the court, therefore, for the relief prayed for in the complaint.

The Court: Do you have anything to say at this time?

Mr. Phelan: Nothing at all.

The Court: Call your first witness.

Mr. Phelan: May it please the court, may we have the witnesses excluded from the courtroom?

The Court: Do you have any objection?

Mr. Bohn: I have no objection, your Honor.

The Court: In the case of Joseph A. Siciliano,

plaintiff, vs. American Pacific Dairy Products, Inc., by stipulation of the parties, all witnesses who have been subpoenaed to testify in this case or who expect to testify in this case will leave the courtroom and remain out until their testimony has been given except for one witness for the plaintiff and one witness for the defendant.

Mr. Bohn: May I proceed, your Honor to call the first witness.

The Court: Yes.

Mr. Bohn: Mr. Siciliano. [6]

MR. JOSEPH A. SICILIANO

the plaintiff, was called as a witness in his own behalf, was duly sworn and testified as follows:

Direct Examination

By Mr. Bohn:

Q. Would you please give your full name, Mr. Siciliano? A. Joseph A. Siciliano.

Q. And where are you presently residing?

A. Maite, Barrigada.

Q. Do you own your own home there?

A. I do.

Q. And what business are you presently operating in Guam?

A. Talk of the Town restaurant, Pacific Bakery, Pacific Snack Bar. I also have a farm and am part owner of a ship, the Arctic.

Q. Calling your attention to the month of June, 1952, prior to the 20th day of June, 1952, what business were you operating at that time?

A. Pacific Bakery, Talk of the Town, and Pa-

(Testimony of Joseph A. Siciliano.)

cific Snack Bar. Also the starting of the farm at that time and the ship.

Q. Approximately how many employees did you have at that time?

A. Oh, I'd say between 100 and 110.

Q. And did you operate your various businesses through any corporate entity or enterprise? [7]

A. I did.

Q. And what was the name of that corporation?

A. Pacific Enterprises, Inc.

Q. And approximately what is your estimate of the amount of money that you were handling each day for all of your enterprises?

A. I would say approximately \$2,000 a day, anywhere from \$1,500 to \$2,000.

Q. And Mr. Siciliano when did you first meet Mr.—withdraw that question. Do you know Mr. Edward Thompson? A. I do.

Q. And when did you first meet Mr. Thompson?

A. I met him some time back in 1951.

Q. That is the year 1951? A. 1951.

Q. And what was the occasion of that meeting?

A. To talk about the business of selling ice cream in the Dairy Queen.

Q. Did you have any conversations with Mr. Thompson at that time? A. Oh, many.

Q. By "many" how many do you mean?

A. Numerous. We had also correspondence. Somebody introduced us and then when he came out here we had numerous talks about going into business to sell ice cream. [8]

(Testimony of Joseph A. Siciliano.)

Q. And about when in 1951 was this?

A. Well, dates I am very bad—probably in the middle of '51. The records will show.

Q. And you said that you and Mr. Thompson had numerous discussions about getting into business in Guam?

A. That is correct.

Q. And as a result of these conversations did Mr. Thompson ever cause you to be appointed managing agent for American Pacific Dairy Products?

A. He did.

Q. I show you what purports to be a certificate of adoption of corporate resolution of American Pacific Dairy Products, Inc., which is dated March 19, 1951, and ask you to read this and tell us whether or not this resolution is the one appointing you managing agent for the American Pacific Dairy Products on Guam.

A. You want me to read this?

Q. It isn't necessary to read it out loud. Just identify it.

A. This is right.

Mr. Bohn: I now offer this in evidence, if your Honor please, as Plaintiff's Exhibit No. 1.

The Court: Any objection?

Mr. Phelan: None.

The Court: Without objection, it will be [9] received.

Q. (By Mr. Bohn): Now, Mr. Siciliano, you testified that you had numerous conversations with Mr. Thompson. Do you know whether or not subsequent to the date of your being appointed managing agent for this corporation that in fact Mr.

(Testimony of Joseph A. Siciliano.)

Thompson or American Pacific Dairy Products entered into a contract with one Al Slaughter?

Mr. Phelan: If it please the court, I can't see what bearing this has on this case.

The Court: I think what we are trying to do is trace the development of the relationship between the parties leading up to the making of the partnership agreement. Your objection will be overruled.

Q. (By Mr. Bohn): You say there was such an agreement?

A. There was such an agreement, to my surprise. I was still working on locating land and such stuff and all of a sudden I found out from Mr. Slaughter when he come back from the States that he had some kind of an agreement with Mr. Ed Thompson and at that time I felt pretty bad because he was dealing with me previously, and when I heard about this with Slaughter I felt I was being let down, and I was going to go ahead with Jack from Honolulu. He had had an ice cream plant and I was going to put in a similar thing because I was pretty angry at that time. I worked on that part and Mr. Thompson heard of it and Mr. Moylan had the agency for the soft freeze machine and some time after that—before I went into it I guess— [10] it was maybe a month or two months because I was also looking for a location, Mr. Thompson wrote me a few letters and told me he was not satisfied with Mr. Slaughter, he was changing his mind because he was not doing the job the way it was supposed to be. The building that was going up cost

(Testimony of Joseph A. Siciliano.)

too much and at that time I stopped going into the other thing until I heard further from him, which I did later on.

Q. And as a result of this correspondence and these negotiations with Mr. Thompson were you ultimately offered a full 50 per cent participation in the Dairy Queen of Guam?

A. I was because Mr. Thompson knew I wouldn't take it for less than 50 per cent. That was our previous conversations many times before.

Q. Now as the result of you and Mr. Thompson reaching such an agreement did you sign any contract with him or with American Pacific Dairy Products?

A. We signed a contract some time in June.

Q. June of what year? A. '52, 1952.

Q. By this time you had been negotiating with Mr. Thompson over a year, is that correct?

A. Oh, at least a year.

Q. I show you what purports to be Articles of Co-partnership dated June 23, 1952, in which Joseph Siciliano is described as a partner and American Pacific Dairy Products, a corporation, [11] is described as another partner and ask you to glance at the agreement and the signatures and tell us whether this is the contract that was executed?

A. This is it.

Mr. Bohn: If your honor please, I now offer this as Plaintiff's Exhibit next in order.

The Court: Any objection?

(Testimony of Joseph A. Siciliano.)

Mr. Phelan: No objection.

The Court: It will be received as Plaintiff's Exhibit No. 2.

Q. (By Mr. Bohn): Now, Mr. Siciliano, did you also sign a supplementary agreement involving the American Pacific Dairy Products on or about the 23d day of June 1952? A. I did.

Q. I show you what purports to be an agreement dated that date in which various material is repeated, supplementing the partnership agreement, and ask you to glance through the signatures and tell us whether this is the one that was executed?

A. This is the one.

Mr. Bohn: If you honor please, I then offer this agreement dated June 23, 1952, as Plaintiff's Exhibit next in order.

Mr. Phelan: No objection.

The Court: Any objection?

Mr. Phelan: None.

The Court: There being no objection, it will be received [12] as Plaintiff's Exhibit No. 3.

Q. (By Mr. Bohn): Mr. Siciliano, as a part of the same transaction was there assigned to the Dairy Queen of Guam a certain lease of real property upon which the building of the Dairy Queen of Guam rests?

A. That is right, there was.

Q. I will show you what purports to be an assignment of lease of real property which is dated June 23, 1952, and ask you—which purports to be an assignment of a certain lease in Anigua to the

(Testimony of Joseph A. Siciliano.)

Dairy Queen of Guam and ask you to identify this document, if that was the one that was signed and received? A. This is the one.

Q. That was the one that was received?

A. (Nods head.)

Mr. Bohn: I now offer this assignment of lease of real property as Plaintiff's Exhibit next in order.

The Court: Any objection?

Mr. Phelan: No objection.

The Court: Without objection, it will be received.

Q. (By Mr. Bohn): Now, Mr. Siciliano, was there also executed about the 23d day of June a certificate of co-partnership transacting business under fictitious name? A. Yes, that is right.

Q. I will ask you to examine what purports to be such a certificate and ask you if that was the one so signed? [13] A. This is the one.

Mr. Bohn: I now offer what purports to be a certificate of co-partnership transacting business under fictitious name as Plaintiff's Exhibit next in order.

The Court: Any objection?

Mr. Phelan: None.

The Court: It will be received as Plaintiff's Exhibit 5.

Q. (By Mr. Bohn): Mr. Siciliano, was that certificate filed in the appropriate government office according to the laws of Guam?

A. It was by Mr. Lyle Turner.

Q. It was filed? A. Yes.

(Testimony of Joseph A. Siciliano.)

Q. And was there received a certificate dated August 21, 1952, signed by Richard Taitano, Director of Finance, which indicates this was received on August 1st and entered as No. 23 in the records of Guam? Check that and see.

A. That is right.

Mr. Bohn: I now offer this as Plaintiff's Exhibit next in order.

The Court: Any objection?

Mr. Phelan: No objection.

The Court: Without objection, it will be received as Plaintiff's Exhibit No. 6.

Q. (By Mr. Bohn): Now to the best of your knowledge, [14] Mr. Siciliano, has that certificate of co-partnership doing business under a fictitious name ever been canceled in the records of Guam?

A. Not that I know of.

Q. You never signed such a cancellation?

A. No.

Q. To the best of your knowledge it continues to transact business under a fictitious name and is composed of a partnership between American Pacific Dairy Products and yourself?

A. That is right.

Q. After these contracts—withdraw that question. Did you pay the sum of \$15,000 to Mr. Thompson or American Pacific Dairy Products in accordance with the requirements of that contract?

A. At that time I think I gave him \$7,500 and the other \$7,500 was left in the bank account which he was to receive later on.

Q. The total was \$15,000?

(Testimony of Joseph A. Siciliano.)

A. That is right.

Q. Have you received that \$15,000 back?

A. No.

Q. Have you received any money of any kind from the Dairy Queen of Guam? A. No.

Q. You have never received any profits? [15]

A. No profits.

Q. Now after these agreements what did you do?

A. Went right to work and opened up the Dairy Queen. In fact we were working on the opening at that time. I opened it as soon as possible and I worked there for a week or so, broke in the boys, got my best boys down there who knew about ice cream and broke them in on what to do to make and sell ice cream. I got a few pointers from Mr. Thompson before he left and went right to work with them.

Q. You referred to good boys. Are you referring to employees of Pacific Enterprises? A. Yes.

Q. Did you ever operate an ice cream business before? A. Oh, I did.

Q. Where? A. 20th Air Force Base.

Q. Was that on the island of Guam?

A. Yes.

Q. When was that?

A. 1948. We had one of the largest ice cream plants on the island of Guam and I was allowed to sell out of my own snack bar. I had to supply them first.

Q. Had any of these employees you put in the Dairy Queen of Guam any previous experience?

(Testimony of Joseph A. Siciliano.)

A. They had. [16]

Q. They had worked around ice cream?

A. Yes.

Q. And it was for that reason you chose them, is that correct?

A. Oh, yes.

Q. Now, did you also, at the same time you were breaking in these boys, did you also have one of your key supervisory employees working with you?

A. Joseph Meggo. M-e-g-g-o.

Q. Now, how many snack bar and restaurant operations have you and Joe Meggo operated on the island of Guam?

A. I operated a large cafeteria which fed 2 to 3,000 people a day and I opened nine snack bars, plus the ice cream plant at Harmon Field.

Mr. Phelan: If it please the court, I can't see what those snack bars have to do with the Dairy Queen of Guam.

The Court: Part of your defense is failure to properly operate the Dairy Queen. I think the purpose of this line of questioning is to establish the competency of operation at the time the snack bar or the ice cream place was opened. Your objection will be overruled.

Q. (By Mr. Bohn): Now, did Mr. Joseph Meggo also act as one of your supervisors when you were running the ice cream plants at Harmon Field?

A. He was supervisor of all the snack bars, also the ice [17] cream plant.

(Testimony of Joseph A. Siciliano.)

Q. Mr. Joseph Meggo worked with you while you were opening up the Dairy Queen, is that correct? A. He did.

Q. And did you then turn over the supervision of Dairy Queen to Mr. Meggo? A. I did.

Q. And did Mr. Meggo in fact supervise the operations of Dairy Queen? A. He did.

Q. And for how long a period was that?

A. Well, up to when Mr. Norman Thompson took over.

Q. And the man that was in charge of the Dairy Queen until Mr. Norman Thompson took over was Mr. Joseph Meggo, is that correct?

A. That is right.

Q. You have already stated that you have not received any funds at all from the operation of the Dairy Queen of Guam. I now ask you this question: Have you ever received an accounting of the operations of the Dairy Queen of Guam since Mr. Norman Thompson took over? A. No.

Q. And for that reason you are not now familiar with the amount of profits or as to what happened to the money, is that correct? [18]

A. That is true.

Mr. Bohn: That will be all of this witness, Mr. Phelan.

Cross-Examination

By Mr. Phelan:

Q. Mr. Siciliano, you entered into this partnership on the 23rd day of June, 1952?

A. That is right.

(Testimony of Joseph A. Siciliano.)

Q. And under the terms of this partnership you were to be the manager of Dairy Queen, is that right?

Mr. Bohn: I object to that, if your Honor please; it calls for a conclusion of the witness and the contract speaks for itself.

The Court: The objection will be overruled.

Q. (By Mr. Phelan): Were you to be the manager?

A. I was to overlook the operation and get it started.

Q. You weren't to be the manager?

A. Well, I don't know what you call it. If you want to call it a manager, I was the manager, but not to be there all the time but to get it in operation.

Q. Did you have any other duties?

A. Many—Talk of the Town——

Q. In connection with Dairy Queen?

A. First of all to get the boys trained, show them how to sell it, keep the books, just the normal operations.

Q. How much time did you spend at the Dairy Queen? [19]

A. When I first got there to open it up I would say I spent at least 14 to 16 hours in the beginning.

Q. For how many days?

A. Eight or nine days.

Q. How much time did you spend at the Dairy Queen after that?

A. After that I left the island of Guam.

(Testimony of Joseph A. Siciliano.)

Q. How long were you gone from Guam?

A. Approximately two years.

Q. During that period did you ever return to the island of Guam? A. I did not.

Q. Now, speaking of your boys—were they employed by you, personally?

A. They were employed by Pacific Enterprises.

Q. Are you and Pacific Enterprises the same?

A. Well, practically. I am a majority stockholder and president of it.

Q. What percentage of the stock do you own in Pacific Enterprises?

A. Around 94 per cent, something like that.

Q. So that for all intents and purposes you and Pacific Enterprises are the same?

A. Practically the same.

Q. You used employees of Pacific [20] Enterprises? A. I had to.

Q. Do you have any employees of your own?

A. They are Pacific Enterprises, which I consider just like my own.

Q. So anyone working for Pacific Enterprises you consider as working for you?

A. Working for me and for Pacific Enterprises.

Q. Now, when did Dairy Queen open?

A. I am not sure of the date; it was around June 22 or June 23, maybe a little before; I am not just sure.

Q. And when did you leave Guam?

A. July 1st or 2nd.

(Testimony of Joseph A. Siciliano.)

Q. And during that period you spent 12 to 16 hours a day at the Dairy Queen?

A. At the Dairy Queen of Guam.

Q. Every day?

A. Every day; never missed a day.

Q. Who else spent time there?

A. Tony Toquero—he was the main one. I had two other boys come, then Freddy—I don't remember all their names, just their nicknames—and Joe Meggo.

Q. How often did he come down there?

A. The main important parts of the day, the mixing time, late at night or early morning or the afternoon to show him what we were doing with the mix, how to keep the records. In [21] other words, the important part of the day he was down there with me so he could learn something.

Q. During how much of that period was he down there?

A. I would say approximately four hours or five hours. He would bring down my lunch and stay two hours then he would come back at night when I was closing. I would say again, four or five hours.

Q. Was anybody else there?

A. My Filipino boys I was breaking in. They were always there.

Q. What hours was the store opened during those days?

A. I think it was 11:30 or noon until closing at

(Testimony of Joseph A. Siciliano.)

12 at night. We had it open by noon to get the kids at school.

Q. How big is the store?

A. 24 by 18, something like that.

Q. How many machines has it got?

A. Two machines.

Q. Now, during that period that you were down there, what did you do personally?

A. What did I do personally?

Q. Yes.

A. Teach the boys how to make the mix, get the cold water in it the right way, prepare the mix, show them how to load the machines without overloading, every little detail like that and to teach the boys how to be clean. That was number one [22] because the medica were on our back.

Q. After the 1st or 2nd of July, what did you do?

A. I just left Mr. Meggo in charge. I only knew a day or two before I was leaving that I was leaving. I got Mr. Meggo down there and told him to run the operation the same as I was running it.

Q. Yet your partnership agreement said you were to be the manager?

Mr. Bohn: I object to that, if the court please, for the same reasons. The partnership agreement speaks for itself. It does not say he was to be manager. He is putting words in his mouth.

Mr. Phelan: I suggest you read the agreement.

Mr. Bohn: I have read it.

The Court: I think the witness has explained all you need to know.

(Testimony of Joseph A. Siciliano.)

Q. (By Mr. Phelan): Did you have any authority to place a manager down there? A. I did.

Q. What authority?

A. Authority of myself because I was running the business on Guam. I was to overlook the business. There was no agreement as I remember that I had to get a report or anything to put somebody down there. It was understood that I could not ever give it my full time, just the operation to see that it was run [23] right.

Q. What other duties did Mr. Meggo have at that time?

A. He had the collection of the money in the snack bar which I was operating, daily, also overlook the bakery. He was more or less in a supervisory capacity. He ordered flour for the bakery, overlooked the boys at the bakery, also at the snack bar and collects the money morning, afternoon and night and does the same thing for Dairy Queen.

Q. He collects the money three times a day?

A. No; he wouldn't put it in the bank but in the petty cash. He would be down there in the morning to put in the petty cash and around 4:00 o'clock at the change of shift he would take the money they had and come back at night before closing.

Q. Did he also handle your banking?

A. No.

Q. Who made your deposits?

A. Mr. Henry Diza or whoever was in charge of the office.

(Testimony of Joseph A. Siciliano.)

Q. Were they made daily?

A. No; Madeline Dorsit was here and she was handling the money. After she left Henry Diza handled the money.

Q. Did he bank daily?

A. No; he did not bank daily because he had no authority to sign checks so he just kept the cash in the safe.

Q. The Dairy Queen cash?

A. The Dairy Queen cash, yes. [24]

Q. Did he ever bank it?

A. You mean in my own organization?

Q. Or the Dairy Queen.

A. I don't think on the Dairy Queen he has; I am not sure.

Q. Did anybody bank it for the Dairy Queen?

A. Yes; Madeline Dorsit and Mrs. Matson who was here at that time to help set up the books. Madeline Dorsit took care of everything until the time she left here because she was the comptroller.

Q. You actually spent eight or nine days at the Dairy Queen?

A. Well, whenever it was open I was there. Previous to that and the day we opened up for business, I was there every day until I left. In fact, I practically had my clothes down there when I left for the plane.

Q. Now, when you left you left the control of Dairy Queen with the employees of Pacific Enterprises? A. That is right.

Q. When did you advise American Pacific Dairy

(Testimony of Joseph A. Siciliano.)

Products, Inc., of the fact that you had turned the control of the store over to this corporation?

A. When I got into the States I called Mr. Thompson and told him of my problems and I told him that the place would be operated all right and not to worry about it.

Q. When did you tell him you were coming [25] back?

A. I told him I would be back in six or eight weeks. I didn't expect to be gone longer than eight weeks.

Q. And you were gone for two years?

A. That is right.

Q. Now, you left this business in the care and custody of another corporation?

Mr. Bohn: I will object to that on the grounds it is argumentative and it has been asked and answered.

The Court: The objection will be sustained.

Q. (By Mr. Phelan): Did you have a contract on behalf of Pacific Enterprises with the Dairy Queen of Guam? A. No.

Q. You just moved their employees in there and they worked there?

A. That is right. I moved them in there with the understanding also that before that Mr. Thompson knew how I had to put them in there because there were no other employees available at the time. You couldn't even get any.

Q. Did you tell Mr. Thompson at that time that

(Testimony of Joseph A. Siciliano.)

they were employees of your corporation or your employees?

A. He knew of my employees. He knew of my corporation. I don't know whether I told him they were employees of Pacific Enterprises but it had to be; it couldn't be any other way.

Q. You didn't tell him they were your [26] employees? A. No, not personally.

Q. Then for a period of approximately a year the employees of Pacific Enterprises handled the cash, ran the business, had full control of everything? A. That is true.

Q. And kept the books? A. Yes.

Q. Have you ever seen the books?

A. Just in the beginning when we started, that is all.

Q. What kind of books were they?

A. Regular books we keep in business. In order to start right, Mrs. Matson, who was with the Treasury Department there, was good enough to come down there and take the inventory and I remember Madeline—she helped her to keep it separate from the Pacific Enterprises. She helped for two or three weeks or more on the set-up of the books.

Q. She worked for about a month setting the books up?

A. She helped, not only Dairy Queen, but she helped get this set up because she worked for a time with Henry to see we kept good records like a CPA.

Q. Was she working for the Government of Guam at that time?

(Testimony of Joseph A. Siciliano.)

A. Yes, she was but she got permission to come down and work for us in the evening.

Q. Did you set up the books as a branch of Pacific Enterprises? [27]

A. Not as a branch because it was a partnership. I never said it was another branch of Pacific Enterprises.

Q. Now, how much time did Mrs. Matson spend on the books of Dairy Queen?

A. Well, the hours I could not tell. If I told it wouldn't be the truth about it but I know she worked on the inventory. I know she worked on the books. The only one who could answer that would be Henry or Madeline Dorsit.

Q. What was in the inventory?

A. Anything that was down there at the Dairy Queen when we started, containers, cups, things like that.

Q. It took her 30 days?

A. Oh, now, she worked on the books in the office for approximately 30 days.

Q. She worked on the books and Madeline Dorsit did?

A. No; Henry Diza.

Q. Did Madeline ever work on the books?

A. No, sir; she only handled the cash, turned the cash in.

Mr. Phelan: I have no other questions at this time.

(Testimony of Joseph A. Siciliano.)

Redirect Examination

By Mr. Bohn:

Q. At the time that you first reached the agreement with Mr. Thompson which provided you with 50 per cent interest in this business was American Pacific Dairy Products heavily indebted in [28] Guam?

Mr. Phelan: I object to that because there has been no foundation.

The Court: It certainly is not proper redirect examination.

Mr. Bohn: I withdraw the question, if your Honor please. I will try it another way.

Q. (By Mr. Bohn): Did you perform any services for the Dairy Queen of Guam prior to the date it opened? A. Yes, I did.

Q. And what did those services consist of?

A. Well, to see that everything was checked, see that it was in order, clean up the place. The switch boxes wasn't finished, electrical work, machinery—tried out different things like that. It was mostly in general. Anything that wasn't completed we just finished up with our boys. Mr. Thompson was here at the time we checked the water, getting cold water in for the mix and different things like that so we would have it properly set up.

Q. Did you provide the full facilities of your organization and all of its employees where needed to get the Dairy Queen of Guam open and operating?

(Testimony of Joseph A. Siciliano.)

Mr. Phelan: I object. That is a leading question and I think it is improper. I think counsel is doing the testifying.

The Court: Well, again, the question has been asked and answered—he did. [29]

Mr. Bohn: I have no further questions of this witness.

Recross-Examination

By Mr. Phelan:

Q. Based upon the redirect I would like to ask you one question, Mr. Siciliano. You said you checked the machinery and all that. What did Mr. Thompson do? A. He was there, too.

Q. What did he do?

A. Same thing I was doing, but I had my boys do the work. I just checked what had to be done.

Q. What work did your boys do?

A. Cleaning things.

Q. What did they clean?

A. The store out. Everything had to be cleaned—the reefers, the merchandise—opening the boxes, setting things up, washing out the machinery, checking the machinery.

Q. How long did that take?

A. Oh, we were down there at least two or three weeks before we opened.

Q. Two or three weeks?

A. Yes, sir; because the construction people were not finished. We noticed the roof was leaking and we squawked and they fixed it.

(Testimony of Joseph A. Siciliano.)

Q. The construction company fixed the roof?

A. Yes; we made sure they fixed it. [30]

Q. How much time did you spend down there?

A. Oh, about two or three hours a day to see what work was to be done.

Q. About how many boys worked there?

A. Four or five boys.

Q. How much time did Mr. Thompson spend there? A. About the same.

Q. The same amount of time that you did?

A. No; I met him down there. He was down there sometimes before me. He might have spent a little more time than I did, but he was down there.

Q. Your boys cleaned up the building?

A. Yes.

Q. The debris left after the construction?

A. Well, anything that had to be done. When the electrical mixer was set up and didn't work I would get my electrician down there to work on that—different things like that.

Q. How long did your electrician work?

A. That I don't know.

Q. Were you present when he was working?

A. When he started I was, then I left.

Q. What was he working on?

A. The switch box.

Q. What did you do with the machinery?

A. We had to check it. [31]

Q. Who checked it?

A. Mr. Thompson and myself just to see that it worked right making samples.

(Testimony of Joseph A. Siciliano.)

Q. How long did it take to check it?

A. A few hours.

Q. When did you check it?

A. Before we opened.

Q. How long before you opened?

A. I would say about a week or maybe three or four days. The time element I am not just sure. I know it was before we opened. We made some test runs and things like that.

Mr. Phelan: I have no other questions.

Mr. Bohn: I have no further questions of this witness, your Honor.

Examination

By the Court:

Q. Mr. Siciliano, tell me something about this product. Was this a retail outlet?

A. This was strictly a retail outlet.

Q. Yes—what did it sell?

A. Soft ice cream like a custard in pints and quarts, in cones and sundaes.

Q. All of this business was done at the location?

A. At the location.

Q. Now, was this soft ice cream made from a powdered mix? A. That is right, sir. [32]

Q. What do you add to it?

A. Water and powdered milk and vanilla for flavoring.

Q. And where did the powdered mix come from?

A. From the States. We ordered it from the States the same as we would our ice cream mix.

(Testimony of Joseph A. Siciliano.)

Q. Was it a patented mix?

A. The ice cream powdered mix is a patented mix. That is what I was told by Mr. Thompson.

Q. You always purchased from one supplier?

A. Yes, sir; from Mr. Ed Thompson. He would do the ordering for us on the mix.

Q. Now, from this powdered milk, powdered mix, water and so forth you made soft ice cream?

A. That is right, sir.

Q. What was the nature of the equipment that you used?

A. The equipment was a machine, supposed to be a patented machine. I never seen any one like it. It is continuous and makes a pretty good amount. You just keep adding the milk and water and you can continue using the machine continuously all day long if you have a line of people.

Q. Were those machines purchased or did you have them on a rental basis or what?

A. I can't answer that exactly. I thought they were purchased but because of the patent, I don't know. I know they were supposed to belong to us here on Guam, belonged to the [33] partnership.

Q. Do I understand the American Pacific Dairy Products had the patent?

A. Well, either them or a similar organization that Mr. Ed Thompson is in. They have a patent on that machine.

Q. Then this business consisted of mixing this soft ice cream and dispensing it over the counter?

A. And in quarts and pints because we make it

(Testimony of Joseph A. Siciliano.)

up ahead and we put it in a small deep freeze and freeze it and we can sell it in quarts and pints.

Q. You did no wholesale business?

A. At that time we didn't because we had all we could do to make what we could sell retail. It was pretty hard to keep up with what we sold retail.

Q. What did you have to have from the States besides the ice cream mix—such things as cones and containers?

A. Oh, yes, cones, containers. They were ordered from the Zellerbach Paper Company through Dairy Products in the States. They buy in large quantities and we get a good buy on them. We ordered through the Zellerbach Paper Company and also the cones from one place most of the time, who gives the best buy on cones. Then we buy toppings and syrups.

Q. Did the partnership buy these things directly or did they buy them through the corporation?

A. You mean through my corporation? [34]

Q. No; through the American Pacific Dairy Products.

A. Some of them were bought direct and some weren't. Mr. Ed Thompson knew the set up and he naturally, in the beginning, did the ordering until we got to know who to order from.

Q. It was not contemplated that Mr. Thompson would remain in Guam?

A. Oh, no; he would come in and out.

The Court: No further questions.

Mr. Bohn: No further questions of this witness.

The Court: You may be excused, Mr. Siciliano. The court will take a ten-minute recess at this time.

(The court recessed at 10:40 a.m., February 14, 1955, and reconvened at 10:50 a.m., February 14, 1955.)

The Court: I notice that the pretrial order in this case, this companion case, has not been signed. Has it been examined?

Mr. Phelan: I have read it and there are several typographical errors in it, your Honor. First of all, I do not represent the defendants. I only represent one defendant.

The Court: The pretrial order shows that.

Mr. Phelan: Maybe it is in the other case it shows me representing the defendant and I definitely don't. I remember it.

The Court: If so, it was inadvertent. During the noon recess I wish counsel would examine the order and make any [35] corrections. Yes, you are correct. It is understood, of course, that you only represent the American Pacific Dairy Products. Examine the orders at the noon recess and be prepared to approve or recommend any changes. Call your next witness.

JOSEPH MEGGO

called as a witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Bohn:

Q. Would you please give us your full name?

A. Joseph Meggo.

Q. Where do you reside, Mr. Meggo?

(Testimony of Joseph Meggo.)

A. At present?

Q. Where do you reside at the present time?

A. Pedro M. Ada. Where I work?

Q. No; where do you reside?

A. At Tamuning.

Q. At the present time? A. Yes, sir.

Q. Now, where are you employed, Mr. Meggo?

A. Pedro M. Ada.

Q. Where?

A. Manager of the store, Food City.

Q. When were you first employed by Mr. Ada?

A. November, 1954. [36]

Q. 1954. And prior to that time who were you employed by? A. Mr. Joseph Siciliano.

Q. Were you employed by Pacific Enterprises Corporation? A. Yes.

Q. What were your duties with Mr. Siciliano and Pacific Enterprises?

A. As manager of Pacific Bakery. I was doing butchering, meat cutting, all by myself and doing all of his buying for his bakery products, running his snack bar and we had a bake shop, retail, at Marbo. I was working over there, too.

Q. When did you first start your employment with Pacific Enterprises or Mr. Siciliano?

A. 1945, March, I came to Guam. I worked at the Harmon Field Restaurant, then I was managing the Marbo snack bar and the ice cream plant at Harmon Field and I worked in there and also at North Field. In 1949 it was North Field and we had three snack bars there and I was operating that.

(Testimony of Joseph Meggo.)

Q. You continued in your employment with Mr. Joseph Siciliano from March of 1949 until November '54?

A. That is correct. In 1949 I went home and I came back in June when we established the Pacific Enterprises in Tamuning.

Q. And you worked continuously for this employer since that time? A. Yes.

Q. Now, calling your attention to the month of June in [37] 1952—did you have occasion to perform any duties or to work at an establishment called the Dairy Queen of Guam? A. I did.

Q. When did you first start performing any services in connection with the Dairy Queen of Guam?

A. When Mr. Thompson and Mr. Siciliano opened up the Dairy Queen I was helping out, bringing supplies down and all that. I worked up odds and ends, back and forth, a few hours a day, helping Joe and when Mr. Thompson left the island I was Joe's right-hand man for the Dairy Queen four or five hours a day. I even brought his lunch to him. He didn't leave it. His heart and soul was in the Dairy Queen and he showed me the way Mr. Thompson showed Mr. Siciliano and Mr. Siciliano was teaching me the way Mr. Thompson taught Mr. Siciliano.

Q. And you were familiar with the requirements from operating the ice cream plant at Harmon?

A. I was.

(Testimony of Joseph Meggo.)

Q. You know about bacteria count and so forth?

A. I did.

Q. And you knew how to store ice cream and dispense it? A. I did.

Q. Now, after Mr. Siciliano left Guam, what service did you continue for the Dairy Queen?

A. He put me in charge of the Dairy Queen and I followed on exactly how he showed me. [38]

Q. How long did that continue with you as manager of Dairy Queen?

A. Well, until Mr. Thompson, Jr., arrived in Guam.

Q. About when was that, do you remember?

A. I can't recall because I was responsible for Pacific Enterprises, too.

Q. You were continuously the manager until Mr. Norman Thompson took over, is that correct?

A. That is right.

Q. How many days a week did you perform services for the Dairy Queen?

A. Seven days a week.

Q. Is that true throughout the entire period?

A. Every day I was at the Dairy Queen.

Q. What did you do in the morning?

A. I stayed there for an hour or two, took the money to them—the bank—I had other duties—the Talk of the Town and snack bar. I brought chow to them from the Talk of the Town. I stayed until each boy had their chow. I stayed there until school was going then I went back to Pacific Enterprises then 4:00 or 4:30 I changed their bank. I changed

(Testimony of Joseph Meggo.)

their bank each shift, then about 7:00 or 8:00 o'clock at night, if I knew it was going to be busy at a certain time, I went down and gave the boys a hand. I had the two machines working and I took care of the customers as they came to the window. [39]

Q. So approximately how many hours a day did you put in physically at the Dairy Queen establishment?

A. Four or five hours, maybe six sometimes. It all depends—sometimes we had to close late because of so many customers.

Q. Did you physically transport the employees from their place of residence to the place of employment? A. I did.

Q. That was in the morning? A. Yes.

Q. How about the change of shift in the afternoon? A. I did.

Q. You took the new shift down there from their residence?

A. Yes, and took the old shift back.

Q. Did you bring lunch to both shifts?

A. Just one shift. We brought it down for the last shift from the Talk of the Town.

Q. It was a general rule that food was brought from the Talk of the Town but for one shift you didn't? Did you know any of the employees—you referred to them as boys—did you know any of the employees of Dairy Queen of Guam before the Dairy Queen of Guam opened? A. I did.

Q. Did you know them all? A. All. [40]

Q. How did you happen to know them?

(Testimony of Joseph Meggo.)

A. They worked for Pacific Enterprises before Dairy Queen opened and two boys worked in the ice cream plant.

Q. At Harmon Field? A. Yes.

Q. The other two boys—had they also worked for Pacific Enterprises? A. Yes.

Q. And to your knowledge, are any of those boys still working at the Dairy Queen?

A. They are.

Q. How many of them? A. Two.

Q. In other words, two of the original employees that you and Mr. Siciliano started at the Dairy Queen are still working there, is that correct?

A. Yes.

Q. Now, were there any break-downs or machinery or equipment at the Dairy Queen during the period you supervised its operation?

A. There were.

Q. How frequently did they occur?

A. Usually the knives were not too sharp. We had to either get them replaced or get them sharpened. We sent cables to Mr. Thompson to send us knives and he did, but we did the best [41] we could to keep the Dairy Queen in operation without closing.

Q. When the break-downs occurred, what did you do?

A. We had a maintenance man of our own and we would call him to come down and see what he could do with it.

Q. You mean Pacific Enterprises?

(Testimony of Joseph Meggo.)

A. Yes.

Q. Pacific Enterprises maintained a full crew, is that right? A. That is right.

Q. And when there was a need for maintenance or repair you used the Pacific Enterprise crew?

A. We did.

Q. Did you have occasion to use an electrician?

A. We did.

Q. Carpenters? A. Yes.

Q. Did you have occasion to use any refrigeration mechanics? A. We did.

Q. Did you have occasion to use any other type of personnel from Pacific Enterprises?

A. No—my own.

Q. Your own time? A. Yes.

Q. During this period of time did you construct any [42] additions to the original Pacific Enterprises building? A. At the Dairy Queen?

Q. I beg your pardon. I misspoke myself. Did you construct any additions to the original Dairy Queen building during this period of time?

A. We did.

Q. What did those additions consist of?

A. We put on an extension, a wing on, and we also build a new cesspool. The Pacific Enterprises boys did it themselves.

Q. That was done with your own crew?

A. Our own crew.

Q. Now, Mr. Meggo, how did you handle the money that was coming in daily from the Dairy Queen? A. Well, is that after—

(Testimony of Joseph Meggo.)

Q. When you first started handling it.

A. After Mr. Siciliano left the island?

Q. That is correct.

A. I would go down there, get the money and bank it for the two shifts. When they changed I counted the money right there and at that time the register was working. I took the reading and I had to count the money right there and I took it back and give it to Mr. Diza in the Pacific Enterprises office.

Q. Mr. Diza was the bookkeeper or accountant?

A. The bookkeeper.

Q. By giving them the bank you mean giving them petty [43] cash for purposes of change?

A. That is right.

Q. When you went down there in the morning you would bring the two employees and always give them their petty cash and they had to account for it, is that correct? A. That is right.

Q. Now, when the shift changed in the afternoon, did you mean that you set up another petty cash fund for the new employees?

A. For the new employees.

Q. And you took all the money from the employees whom you had set up the bank for or petty cash fund in the morning, is that correct?

A. That is right.

Q. What time did the Dairy Queen close, by the way? A. 11:00 o'clock.

Q. At nighttime, when it was time to close, you would then get the money from the last shift and

(Testimony of Joseph Meggo.)

you would take that money also to the office of Pacific Enterprises where it was placed in the safe, is that correct? A. That is right.

Q. Now, did you take daily readings of the cash register?

A. We couldn't take them because the register wasn't in working order, but the early part of '53 we had another register put in there and we started taking readings. [44]

Q. But the cash was counted throughout this early period of time? A. Yes.

Q. During the period of your supervision was the Dairy Queen ever closed down for a full day?

A. Yea.

Q. Did it happen more than once?

A. Twice.

Q. Can you tell us the reason on each occasion?

A. Lack of material, merchandise, mix and so forth.

Q. Lack of mix? A. Mix.

Q. Where did you order—withdraw that question. Did you order all the supplies for Dairy Queen?

A. I put the order in the office to have Mr. Henry Diza—exactly what I wanted and he got in contact with Mr. Thompson.

Q. And the supplies were then sent from the States? A. By Mr. Thompson.

Q. Where were the supplies warehoused?

A. In Pacific Enterprises.

(Testimony of Joseph Meggo.)

Q. Were they kept in a segregated area of Pacific Enterprises?

A. They were kept in the same warehouse that we keep Pacific Enterprises merchandise. [45]

Q. Were they segregated?

A. They were segregated.

Q. Did you keep daily inventories?

A. Daily inventories.

Q. Did you require a person to sign for the merchandise to Dairy Queen? A. We did.

Q. Did you turn all those records into the office to Mr. Diza? A. To Mr. Diza.

Q. Who was responsible, Mr. Meggo, for picking up merchandise at the dock and transporting it to the Dairy Queen? A. I was.

Q. And did you frequently do that?

A. Every day.

Q. What equipment did you use to pick up the merchandise?

A. Pacific Enterprises equipment, truck, reefer truck.

Q. Was there also a reefer truck which was kept full time or most of the time at the Dairy Queen?

A. There was.

Q. What was that used for?

A. Supply. We were doing such a tremendous business we couldn't keep quarts and pints so we would put them in the reefer truck to hold in case we got a rush. We had such a small unit in the Dairy Queen we couldn't hold all the supplies. [46]
We had to use the reefer truck for an emergency

(Testimony of Joseph Meggo.)

setup so we would have enough to supply the people.

Q. And that reefer truck was a Pacific Enterprises truck, is that correct?

A. Pacific Enterprises truck.

Q. That you used during this period. Did you ever order on behalf of Dairy Queen any merchandise from Pacific Enterprises?

A. From Pacific Enterprises?

Q. Yes; in other words, did Pacific Enterprises ever furnish merchandise to the Dairy Queen?

A. Yea; just a few items—chocolate, frozen strawberries—whenever Dairy Queen ran out of them I had to use Pacific Enterprises so when the order came in for Dairy Queen I just replaced what I took from Pacific Enterprises.

Q. And complete records were kept on all these transactions, is that correct?

A. That is correct.

Mr. Bohn: I have no further questions at this time.

Cross-Examination

By Mr. Phelan:

Q. Mr. Meggo, when was the first time you went down to the Dairy Queen?

A. Well, the first day it was opened.

Q. That was the first time you were down there?

A. Yea. [47]

Q. How long were you down there that day?

A. About 15 or 20 minutes a day at that time.

(Testimony of Joseph Meggo.)

Q. When was the next time you were down there? A. Oh, maybe two days later.

Q. How long were you down there that day?

A. Well, see, at that time Mr. Siciliano was down there himself. There was no use of me staying down there because I had work for Pacific Enterprises.

Q. When was the next time you were down there?

A. Well, after Mr. Thompson left the island I was down there almost every day.

Q. What hours was the store open?

A. About 10:00 o'clock in the morning, between 10:00 and 11:00. That was when Mr. Thompson was there. That was when the business started.

Q. And what time did the shifts change?

A. 4:30.

Q. The men went to work at about 10:00?

A. Yea. Oh, earlier. I don't know—I think a little earlier to get the mix all prepared for opening time. It takes about an hour or so before we could open up to get the mix through the machine and all.

Q. And you took the men to work?

A. Oh, yes. When Mr. Siciliano was opening he took the men down himself. There was no need for me to come down. [48]

Q. How long was he opening?

A. Until he left.

Q. When did he leave? A. I can't recall.

Q. Approximately how long was he gone?

A. Two years.

(Testimony of Joseph Meggo.)

Q. Now, during that two-year period you acted as manager? A. After Joe left, yea.

Q. What instructions did he give you when he left?

A. Just take over as he left and I should follow in his footsteps.

Q. Now, you said you took daily readings from the cash register?

A. Yea, daily before the cash register broke and the tape wouldn't work so we just had to count the money.

Q. When did the cash register break?

A. I can't remember.

Q. For how long a period was it broken?

A. I can't remember.

Q. Were tapes taken from this register until it broke?

A. No; that broke when Mr. Siciliano was here.

Q. When you replaced it with another machine, were tapes taken from that?

A. Yes; the early part of '53.

Q. Who took those tapes? [49]

A. I did.

Q. What did you do with them?

A. Put them in the Pacific Enterprises office.

Q. Who did you give them to?

A. Henry Diza.

Q. What were your other duties with Pacific Enterprises?

A. I was manager of Pacific Bakery and the snack bar. I was running the snack bar, too, and

(Testimony of Joseph Meggo.)

ordering all the supplies for Talk of the Town and doing all the buying for Pacific Enterprises.

Q. Were you managing the bakery?

A. I was managing the bakery.

Q. Now, how much time did you spend at the Snack Bar?

A. Well, we had four good capable boys at the snack bar. Their background was good.

Q. How much time did you spend there?

A. An hour.

Q. How many shifts did you have there?

A. Two shifts.

Q. What time did you open up?

A. 9:00 o'clock in the morning.

Q. What time did you close?

A. That was before we put the new building up. We closed at 12:00.

Q. When did you put the new building up? [50]

The Court: I think counsel should confine himself to the Dairy Queen.

Mr. Phelan: I am trying to find out the extent of those duties. He said he had other duties than the Dairy Queen.

The Court: I don't think it is material except as to the time he spent at the Dairy Queen.

Mr. Phelan: We might find out how much time he spent at Dairy Queen, too.

The Court: Yes, but the direct examination was limited to the time he spent at the Dairy Queen. I think cross-examination should deal with that.

(Testimony of Joseph Meggo.)

Q. (By Mr. Phelan): Now, who kept the books at the Dairy Queen when you were running it?

A. Mr. Henry Diza.

Q. During the entire period?

A. During the entire period.

Q. Did you ever see the books? A. No, sir.

Q. Who handled the bank deposits of Dairy Queen? A. Mr. Henry Diza.

Q. Mr. Diza made the deposits. Do you know how often he did? A. (Shakes head.)

Q. Did you make any cash disbursements from the Dairy Queen? [51] A. No.

Q. Do you know of any cash disbursements during that period? A. No.

Q. You also took all the cash to Mr. Diza?

A. To Mr. Diza.

Q. No money was paid out down at the store?

A. No.

Q. Now, how many days during that period was the store closed? A. What period?

Q. During the period you were running it.

A. The only loss of time was on the supplies.

Q. Well, how many days? A. A week.

Q. One week? A. (Nods head.)

Q. What supplies did you take down there?

A. At the Dairy Queen?

Q. Yes; how frequently did you take supplies down there? A. Every day.

Q. What type were they?

A. Mix, extract, vanilla, stuff like that, cones, pints and quarts containers.

(Testimony of Joseph Meggo.)

Q. Now, how often did you haul supplies from the dock? [52]

A. Oh, every time we had merchandise come in on a ship.

Q. Didn't you, in answer to a question on direct examination, say you hauled supplies from the dock daily? A. No, I did not.

Q. Now, where, when you hauled supplies, were they kept?

A. Pacific Enterprises warehouse.

Q. In their warehouse? A. (Nods head.)

Q. And I believe you said they were segregated?

A. They were.

Q. How were they segregated?

A. In one section of the warehouse all belonged to Dairy Queen.

Q. Were they screened off?

A. No, sir; we kept the doors locked.

Q. Could anybody draw them out?

A. I drew them out myself.

Q. When you got the supplies from the dock and put them in the warehouse did you maintain a separate stock record card for Dairy Queen?

A. Separate cards.

Q. What type of cards?

A. Stock record cards. Every day when we draw the supplies we deduct it from the cards.

Q. Do you know where those cards are? [53]

A. We had them there.

Q. When supplies were issued to Dairy Queen, who signed for them?

(Testimony of Joseph Meggo.)

A. The boy who was in charge.

Q. You took the supplies down? A. I did.

Q. Who signed when they went out of the warehouse?

A. I issued a slip to the truck driver who takes it down and it had to be signed and brought back.

Q. Did you make any reports on the operation of Dairy Queen? A. No.

Q. You never made any reports?

A. (Shakes head.)

Q. During the two-year period or that part of it when you were running Dairy Queen did you ever make any reports to Mr. Siciliano?

A. Yea; I did.

Q. How frequently?

A. Twice; two times.

Q. In what form were those reports?

A. Well, in fact, he called me from the States.

Q. On the telephone?

A. On the telephone.

Q. Did you submit monthly reports to him? [54]

A. I can't answer that. That is office work.

Q. Did you, yourself? A. I didn't.

Q. Did you submit any reports to Mr. Thompson or his corporation, the American Pacific Dairy Products? A. No; I didn't.

Q. Were monthly inventories taken?

A. Yea; every month.

Q. Who took them? A. I did.

Q. What was the inventory date?

A. The last of the month.

(Testimony of Joseph Meggo.)

Q. The last day of the month?

A. Every month.

Q. Were daily inventories taken?

A. Every day.

Q. Who took those?

A. That was on the stock cards. I always re-checked myself back.

Q. You took them daily?

A. I even marked the stock cards myself.

Q. Were inventories taken down at the store?

A. Yea; once a month.

Q. Who took those?

A. Myself and the boys. [55]

Q. What did you do with those inventories?

A. Turned them into Pacific Enterprises office to Mr. Henry Diza.

Q. You didn't do the banking for the business?

A. No, sir.

Q. What was the daily bank that you took down there or change bank?

A. \$100 petty cash. Certain days it was \$200 or more petty cash; change in silver.

Q. Now, did you keep or cause to be kept daily records of sales? A. Yea.

Q. Was that the gross amount—

A. Of each shift.

Q. Or was it broken down by type of merchandise?

A. No; just the cash coming in to Pacific Enterprises on each shift. It was a separate account. It was two banks.

(Testimony of Joseph Meggo.)

Q. Did you keep any record of whether you sold ice cream cones or sundaes?

A. Oh, yes; we had a break-down of how many pints and quarts were sold and the 15c and 25c sundaes.

Q. That was kept daily?

A. That is kept daily.

Q. Who kept those records?

A. The boys. Whenever we needed anything from back in [56] the hot locker we would take a hundred more cones and bring them out and mark them down and if that was sold we bring another hundred.

Q. Was a record made for the cash received for those cones?

A. Inventory sheets for every day were turned into the office.

Q. With respect to the meals, what shift had to have meals? A. I can't follow you.

Q. What shift down at the Dairy Queen had to have meals? A. The morning shift.

Q. Where did they eat?

A. I brought the food to them from the Talk of the Town.

Q. What time of the day would you bring that to them? A. 1:00 o'clock.

Q. Now, you turned in all of your records to Mr. Diza? A. I did.

Q. And you, yourself, made no reports to American Pacific Dairy Products? A. No.

(Testimony of Joseph Meggo.)

Q. And two reports, verbal reports, over the telephone to Mr. Siciliano? A. Yes.

Q. Did you keep any notes on the business down there, personal notes?

A. No personal notes. [57]

Q. I believe you said that before Mr. Siciliano left he taught you what he knew about the equipment down there? I believe you also said he taught you what Mr. Thompson taught him?

A. That is right.

Q. In other words, did Mr. Thompson show him how to operate the equipment?

A. The machinery, yea.

Q. What maintenance did you have to have done on the machinery?

A. In the freeze unit the drive shaft broke and we had to make do with a ladle until we could get the new parts from Mr. Thompson. We had a temporary hook-up to keep the machine working. We had two machines.

Q. How often did the machines break?

A. I can't recall the number of times but three or four times. There was a lack of gas in the freezer and the drive chain—we replaced that.

Q. How often would the blades break?

A. Oh, they just wear down; they wouldn't break. If they were too sharp even, we had to get replacements.

Q. How many times did you have repairs made on the building?

A. Well, the building—like we had to fix the

(Testimony of Joseph Meggo.)

roof, outside the door, the surrounding area—we had to clean that all out. The medics were worried about that. It wasn't sanitary. [58] We had to keep that spick and span all the time.

Q. Did you build an addition to the building?

A. An extension or wing.

Q. What did you build that out of?

A. Pacific Enterprise material.

Q. What did you build it for?

A. Well, the Dairy Queen was getting so big we figured on putting all flavors out and two more machines in there.

Q. Who made that decision?

A. Well, it was Mr. Siciliano.

Q. When did he make it?

A. Before he left.

Q. Before he left he gave you instructions to build on an addition? A. An addition.

Q. When was that addition built?

A. I don't remember. Just before he left—'52—the early part. Early part of '52 we started.

Q. Did you ever report that addition to Mr. Thompson? A. Not I.

Q. Was that addition started before Mr. Thompson left? A. After.

Q. Was it started before Mr. Siciliano left?

A. The plans were made—rough sketches—the way he wanted it built according to the same as the Dairy Queen, the [59] same as in the front of it.

Q. But it was in back?

(Testimony of Joseph Meggo.)

A. No; on the side.

Q. You said you never saw the records of the Dairy Queen? A. Yes, sir.

Q. Mr. Diza handled that all the time?

A. All the time.

Q. Did Mr. Siciliano give any instructions in writing before he left?

A. He only told me to take over.

Q. Did anyone else have any authority down there during that period? A. No.

Q. Mr. Wallace Viet didn't? A. No, sir.

Q. Did Mr. Diza have any authority?

A. Well, he made himself the general manager. He was over me; he just stepped in.

Q. Mr. Diza did? A. No, Wally Viet.

Q. And he was vice president? A. Yes.

Q. Did Mr. Diza have any authority down at Dairy Queen?

A. I sent Mr. Diza down a few times because I couldn't make it. He took my place to change the bank. [60]

Q. Diza was an officer of Pacific Enterprises?

A. Vice president.

Q. Did you have an office? A. No.

Q. Were you manager of Pacific Enterprises?

A. Partly.

Q. He had authority over you?

A. As vice president.

Q. Did he give you instructions?

A. No, he didn't give me any instructions.

Q. Did he work down there?

(Testimony of Joseph Meggo.)

A. A few hours.

Q. When?

A. Sometimes when I can't make the Dairy Queen myself, I sent him down there.

Mr. Phelan: I have no further questions.

Mr. Bohn: I have no further questions of this witness.

Examination

By the Court:

Q. Now, Mr. Meggo, as I understand it, after Mr. Siciliano left you provided general supervision. You took the employees to work and at the conclusion of their shifts you brought them back?

A. Yes, sir.

Q. You checked the cash at least once a day and turned over the cash to Mr. Diza? [61]

A. I did.

Q. Whom did you advise as to supplies?

A. You mean when I ordered? When they ordered?

Q. Yes.

A. Well, I checked that myself and what merchandise I needed. I went back to Pacific Enterprises and supplied it for them.

Q. How were they ordered?

A. So many drums of mix—

Q. I mean the orders were sent where? To the suppliers?

A. Yea—no; they were sent to me.

Q. You prepared the orders? You prepared the

(Testimony of Joseph Meggo.)

requisitions for supplies? A. Yes.

Q. Did you send them in to the suppliers?

A. No; I give them to Mr. Henry Diza and he sent them to Mr. Thompson.

Q. In other words, Mr. Diza acted as intermediary to order supplies and pay the bills when they came in? A. That is right.

Q. Were they ordered on behalf of Dairy Queen or Pacific Enterprises? A. Dairy Queen.

Q. But you have no knowledge as to how the cash was handled? [62] A. That is right.

Q. Now, am I correct in the assumption that the Dairy Queen owned nothing except the building and equipment and the supplies, that it had no truck or other motorized equipment?

A. That is right; it didn't have any.

Q. It had no facilities to bring supplies from the dock? A. No.

Q. It had no warehousing facilities?

A. No, sir.

Q. All it had was this retail outlet?

A. That is right.

Q. And it depended upon Mr. Siciliano or Pacific Enterprises for everything else to make it an operating concern? A. That is right.

The Court: Questions, gentlemen?

Mr. Bohn: I have no further questions of this witness.

The Court: You may be excused.

Mr. Bohn: I would like at this time, if it please the court, to call Mr. Edward Thompson as an ad-

verse witness, president of American Pacific Dairy Products.

The Court: Permission granted.

MR. EDWARD THOMPSON

called as an adverse witness by the plaintiff, was duly sworn and testified as follows: [63]

Direct Examination

By Mr. Bohn:

Q. Would you give your full name, please, Mr. Thompson? A. Edward Thompson.

Q. And where do you reside, Mr. Thompson?

A. Seattle, Washington.

Q. What address?

A. I have been living at 1113-18th Avenue, Seattle, for the past eight years. Of course, I am in Guam at the present time.

Q. We understand that. Now, are you president of American Pacific Dairy Products, a corporation?

A. Yes, sir.

Q. And who are the other officers?

A. George A. Henrye is the vice president and Herbert S. Little is secretary-treasurer.

Q. Who are the largest stockholders of American Pacific Dairy Products, Inc.?

A. I think I am probably the largest and others would be George Henrye and Dan A. Kimball. I guess those two would be the next largest.

Q. What is the per cent of your ownership in this corporation? A. Not over 15.

Q. Is it less than 15? [64]

(Testimony of Edward Thompson.)

A. I think it is around 12½ but it may be 15.

Q. That is your ownership?

A. That is right, including what my wife has in her name.

Q. You and your wife own less than 15 per cent?

A. That is right.

Q. What would you say Henrye owns?

A. Around 12½ per cent, quoting from memory. It's pretty accurate.

Q. About the same as you ?

A. A little less, about 12 and mine is about 14.

Q. How much does Mr. Kimball own?

A. He owns a little more than Henrye. He owns about 13½.

Q. That is Dan A. Kimball, former under-Secretary of the Navy? A. Yes.

Q. The three largest stockholders have stock that totals roughly 40 per cent. Who owns the other 60 per cent?

A. A number of people—a doctor in Portland whose name escapes me, Tory Webb in Los Angeles, vice president of a taxi company, another stockholder in Los Angeles whose name escapes me now. These people I do not know personally. There is a man who runs a fleet of trucks in Seattle, Robert Whiting; Archie Taft, who runs a radio station in Seattle; a man by the name of Hutchins, president of Western Advertising Agency; George Shaeffer, who is president of the Seattle Tent and Awning Company, and [65] there may be one or two who have some more amounts.

(Testimony of Edward Thompson.)

Q. When was the American Pacific Dairy Products incorporated?

A. I think it was incorporated in August, 1951, or September, '50.

Q. And what was the capitalization?

A. Authorized—\$50,000.

Q. How much was actually paid in?

A. The articles of incorporation provided that we could start business when \$500 was paid in, but we actually had \$42,500 or very close to that amount.

Q. So it was around \$42,000 shortly after you were incorporated?

A. Not shortly after, no. I would say within a year and a half afterwards. By the time we opened the store we had \$43,600.

Q. By the time you opened the Dairy Queen of Guam you had \$42,000, is that correct?

A. Or \$43,000, yes.

Q. What was the purpose for the organization of the American Pacific Dairy Products?

A. To open up the Dairy Queen stores on Guam.

Q. That was the sole purpose?

A. I think so. We intended to come over here and open up stores. [66]

Q. Have you at any time been secretary-treasurer of Mix Company, Inc., a corporation, with offices in Olympia, Washington? A. Yes, sir.

Q. Do you still hold that position?

A. I resigned last year.

Q. What was the date of your resignation?

(Testimony of Edward Thompson.)

A. March 1, 1954.

Q. Mix Company, Inc.—what line of business are they in?

A. We manufacture mixes, ice cream and ice milk mixes which are wholesaled to retail stores in Oregon and Washington.

Q. Did Mix Company ever furnish any mix to the Dairy Queen of Guam?

A. When we first started, yes.

Q. And that purchase was made by you?

A. Yes, sir.

Q. At the time you were secretary-treasurer of that corporation and president of American Pacific Dairy Products? A. Yes, sir.

Q. How long did those purchases continue?

A. I think we sent two or maybe three shipments and got a better price from Consolidated so I switched over to Consolidated.

Q. Has Mix Company any connection with Consolidated? A. Not at all. [67]

Q. Is the reverse true that Consolidated has a connection with Mix Company, Inc.?

A. At times in the past Consolidated has sold raw milk to Mix Company. They are not selling it now but they have in the past.

Q. Do you have or hold any interest in Consolidated? A. No, sir.

Q. Do you have any stock in Consolidated?

A. No, sir.

Q. What is your connection with Thompson's Freeze, Inc.?

(Testimony of Edward Thompson.)

A. Well, I was the organizer of it and it was owned by the Thompson family. My brother and I and his children had some stock also, but at the present time I have no interest. I sold out all my stock.

Q. When did you sell out all your stock in Thompson's Freeze, Inc.?

A. I would have to guess. It was some time in the fall of '53, I think.

Q. So up to some time in the fall of '53 you had stock in Thompson's Freeze, Inc., as well?

A. Yes, sir.

Q. Prior to the time the Dairy Queen of Guam opened did you ever furnish to the Government of Guam a statement as to what you thought the monthly business would be?

A. I did not, no. [68]

Q. Was such a statement furnished?

A. I don't know.

Q. I am going to show you what purports to be a copy of a communication directed to the Honorable Carlton Skinner, Governor of Guam. At the end it is closed by saying "Respectfully submitted, American Pacific Dairy Products, Inc., by Edward Thompson, president," but it is not signed. I am going to show you that and ask you if you did in fact sign such a document?

A. I did. We submitted it to the Department of Commerce. I had forgotten. It was some time ago but I did sign that.

Q. I will show it to you as soon as your counsel

(Testimony of Edward Thompson.)

has had an opportunity to check it. I am going to ask you to examine this copy, Mr. Thompson, and state if to the best of your recollection that is a copy of what you signed and furnished the Government of Guam?

A. That's it, yes, I would say.

Q. Now, calling your attention, Mr. Thompson, to—withdraw that question. Do you know about when this was submitted? Apparently it doesn't have a date?

A. Yes; it was submitted about the first week of February, within the first ten days of February, 1951.

Q. 1951? A. Yes, sir.

Q. I call your attention to paragraph N, which reads [69] as follows: "The amount needed to activate the business from the date the application is approved is rather difficult to estimate but in Seattle the building would cost around \$10,000 and equipment around \$9,000." Was that your statement at that time as to about what the situation would be?

A. That was what it actually cost us in Seattle. We have had eleven stores in Seattle.

Q. What did this building actually cost you in Guam? A. Counting extras, say \$15,000.

Q. How much did the equipment cost you?

A. I wouldn't say but I think about 12 or \$13,000. I am guessing at that. I know what the building was.

Q. Let me ask you a question a little differently. As of the time that the Dairy Queen of Guam

(Testimony of Edward Thompson.)

opened what was your total investment in the Dairy Queen of Guam at that time?

A. At the time the Dairy Queen of Guam opened on June 22, 1952, it was approximately \$42,500, give or take a few dollars.

Q. That was regardless of any amount contributed by Mr. Siciliano?

A. That is right, yes.

Q. Now, that also was the total amount of your capital, wasn't it?

A. No; we had a thousand or so dollars in the bank.

Q. And that is all you had left? [70]

A. We had \$550 stock that had not been paid for.

Q. Was the corporation indebted to the extent of about \$8,000 in Guam?

A. That is right, sir.

Q. And the debt was unpaid?

A. It had not been paid but it was not delinquent.

Q. And there was no capital in the corporation to pay the debt?

A. Oh, we called on the stockholders whenever we needed money. We could have gotten the money if that is what you mean.

Q. Did you have any cash in the corporation to pay that debt?

A. We had borrowing ability; we had stockholders.

Q. But you had no cash? A. No, sir.

Q. I was just checking something in that report

(Testimony of Edward Thompson.)

but I will ask a few other questions while he is finding it. At the time you made the arrangement with Mr. Siciliano did American Pacific Dairy Products have any employees in Guam?

A. They were Albert Slaughter. He was the manager and we had some Guamanians who Slaughter had hired.

Q. And how long was Albert Slaughter employed by American Pacific Dairy Products?

A. From July or August of 1951, until Siciliano came in about the 21st of June, 1952—not quite a year. [71]

Q. Was he paid a salary? A. Yes, sir.

Q. How much was his salary?

A. \$150 a month. He was to get more when we got going.

Q. How many Guamanians did you employ?

A. About four or five. I have forgotten.

Q. How long were they on the payroll?

A. They were on the payroll from about the 15th or 17th of June, 1952, until I made the deal with Joe Siciliano and then we had Joe Siciliano's Filipinos.

Q. How much did you pay these Guamanians?

A. 75c an hour in some cases; 90c an hour in others.

Q. What services did they perform?

A. When I came here Slaughter hired them and a day or two after they cleaned up the store, opened the boxes, distributed the stock we were going to

(Testimony of Edward Thompson.)

use the opening day. They washed the windows and things like that, getting ready to open.

Q. And as of that time you planned to open the store with Guamanians? A. We did, yes.

Q. What date was that?

A. In June after I got here, 1952. June 21st we let them go.

Q. Did you have an agreement with Mr. Slaughter?

A. Mr. Slaughter told us he was going to Ethiopia and [72] would have to quit. We paid him up to the end of the month—I am not sure about that.

Q. So you say the day Siciliano came in was about the 20th of June?

A. I'd say it was about the 21st.

Q. Now I am going back, with the permission of the court, slightly out of order because I have found the other question that I wished to ask you in this application. I want to call your attention to Paragraph D of the application which reads as follows: "It is rather difficult to estimate the volume of business per year. Our stores in Seattle do about 8 or \$10,000 a month during the summer months but drop off around \$2,000 a month in the winter months. Our fondest hope is that we will not lose as much as the total of the fixed charges. With a better climate we should maintain the same rate throughout the year." That was your estimate at that time?

A. That was our estimate at that time, yes.

Mr. Bohn: I now offer this in evidence, if your

(Testimony of Edward Thompson.)

Honor please, as Plaintiff's Exhibit next in order.

Mr. Phelan: I fail to see what relevancy it has to the case at all.

Mr. Bohn: It is in part preliminary in connection with some of these other matters and partly it sets forth the financial situation of the company at that time, their general plans and their estimates, all of which I think are pertinent. [73]

The Court: Everything that you have talked about has been admitted.

Mr. Bohn: That is correct.

The Court: I find it a bit difficult to understand the relevancy of a document which, according to this witness, was prepared in 1951, in the spring of '51 and the conditions which may have existed in June of 1952.

Mr. Bohn: As I indicated to the court, part of the information was background.

The Court: It shows, of course, Mr. Thompson's best estimate was that stores in Guam or a store would average approximately \$2,000 a month, that is make a profit of approximately \$2,000 a month.

Mr. Bohn: I withdraw my requests, your Honor.

The Court: Isn't there a gross mentioned there of \$10,000?

Mr. Bohn: Between 8 to \$10,000 during the summer months.

The Court: Well, I don't think the document itself has any value except as you have brought out the facts by this witness.

Mr. Bohn: I withdraw my offer.

(Testimony of Edward Thompson.)

The Court: Very well.

Q. (By Mr. Bohn): Mr. Thompson, are you a certified public accountant? A. Yes, sir. [74]

Q. By training? A. Yes, sir.

Q. Have you examined these books and records of the Dairy Queen?

A. The old ones I have looked at them, yes.

Q. I am going to ask you to find in those records, whatever records you have to find to be able to answer questions as to how much money you have received personally or American Pacific Dairy Products from the operation of this business. Could you find such records?

A. The money I received personally or American Pacific Dairy Products?

Q. With reference to both.

A. Well, I can find it. I know the answer to that.

Q. Isn't it a fact that you received the following checks signed by yourself from the Dairy Queen bank account during the period of time it was under the management of Pacific Enterprises: Check No. 12, \$7,500? A. That is right, yes.

Q. Check No. 13, \$4,295.50?

A. Let me get this.

The Court: Now I am not sure I understand just what you are talking about here. Were these checks allegedly made out to Mr. Thompson?

Mr. Bohn: That's right and funds transferred to him. [75] The only purpose of this line of questioning is to show he has received these monies from the Dairy Queen during the period of its operation.

(Testimony of Edward Thompson.)

The Court: What bearing does it have on the partnership and the corporation?

Mr. Bohn: Perhaps I am asking the question the wrong way. What I am seeking to ascertain is what happened to this money that was part of the assets of the Dairy Queen.

The Court: I understand the purpose of your question then is to bring out that the money was transmitted to Mr. Thompson for the corporation?

Mr. Bohn: Well, I don't know what it was for. It was transferred to him. I misstated the fact to the court and for that I apologize. I think it was certainly true a large portion of that money was used for business purposes. I am simply trying to lay a foundation.

Q. (By Mr. Bohn): Check No. 12?

A. Have you got the month?

Q. What was the amount of the check?

A. \$7,500. That one I know, yes.

Q. Did it come to you personally?

A. It came to me personally but it was for American Pacific Dairy and in repayment of the \$7,500 loan.

Q. Check No. 13, \$4,295.50?

A. Yes, I have that here. [76]

Q. And was that to you personally?

A. This was to me personally. In the same month there were other payments sent to me but they were bank drafts bought by Henry Diza.

Q. I was going through the bank drafts later.

(Testimony of Edward Thompson.)

A. That was made to me personally.

Q. Was that transmitted to the American Pacific Dairy Products?

A. No, it came to me personally to reimburse me for bills paid.

Q. From your own pocket?

A. Yes, for repair parts for the freezers.

Q. Check No. 15—was that made to American Pacific Dairy Products?

A. It says here \$4,700, Pacific Dairy Products, but that was for mix. I got that.

Q. The check came to you?

A. Yes, \$537.76—that came to me, too.

Q. Check No. 17 for \$1,200?

A. That came to me, yes.

Q. Check No. 18 for \$5,000?

A. That came to me.

Q. Check No. 19 for \$8,000?

A. That was to me, yes.

Q. Check No. 20 for \$10,000? [77]

A. I will have to look—yes, I got \$10,000.

Q. Check No. 21 for \$6,000?

A. Just a minute—I have an idea I got it but I can't find it immediately. I could find it among the canceled checks if you want to hand me my brief case.

Q. While Mr. Phelan is looking for the cancelled checks, there is an unnumbered check dated June 26, 1953. I do not have the amount.

A. I have that, too.

Q. You have that check?

(Testimony of Edward Thompson.)

A. I got that also, yes, because I happened to notice it this morning. The unnumbered check is dated January 26, 1953. It went to Pacific Dairy Products.

Q. How much is that check for?

A. \$1,000. It went to American Pacific Dairy Products.

Q. Did you find check No. 21?

A. Yes, for \$6,000 made payable to me.

The Court: I don't understand this business of checks being made payable to Mr. Thompson. Are you asking for an accounting here between the corporation and the partnership?

Mr. Bohn: What I am seeking to reach, your Honor, is to prove that—this is what I am seeking to prove by all this line of questioning—that every bit of money which the Dairy Queen took in at any time went to Mr. Thompson or to American Pacific Dairy Products and that the corporation to the extent [78] that they did not spend that money were, in effect, unjustly enriched, if their contention is otherwise sound.

The Court: Is it your contention that you did not pay any bills yourself?

Mr. Bohn: No, your Honor, that is not our contention. I say we paid the small local bills but all the big items were handled by Mr. Thompson himself.

The Court: Is it your contention that you did not place orders and pay them for Stateside—

Mr. Bohn: No, your Honor, we did place orders.

(Testimony of Edward Thompson.)

We placed them with Mr. Thompson and we also sent Mr. Thompson all this money.

The Court: Yes, but is it your contention that all orders for supplies which were placed Stateside were placed through Mr. Thompson?

Mr. Bohn: Substantially all. There perhaps might have been a few small orders which were not but substantially all were handled by Mr. Thompson.

The Court: And except for your local payments you paid him the gross that you received from the operation?

Mr. Bohn: We paid him money as he asked for it and he, in turn, we presume kept a set of records as to what he did with the money. I am simply laying a foundation now.

The Court: Where does the corporation come in?

Mr. Bohn: That is what I would like to [79] know.

The Court: You paid the money. You had a contract with the corporation. Did you ever pay the corporation anything?

Mr. Bohn: Some of the checks are made payable to the corporation. Some of the checks are made payable to Mr. Thompson, which he has testified he used for corporate purposes, as I understand it.

Mr. Phelan: I don't believe he has testified any such thing.

Mr. Thompson: To pay bills mostly.

The Court: Then as I understand it, your con-

(Testimony of Edward Thompson.)

tention is that Mr. Thompson and the corporation are interchangeable?

Mr. Bohn: That is my contention.

The Court: Very well, you have got up to payments of your checks. What do they total?

Mr. Bohn: I do not have the total, your Honor. Do you have the total of these checks?

Mr. Thompson: No.

Mr. Bohn: Well, we can total them at the noon recess.

Q. (By Mr. Bohn): Those checks were all delivered to you either for yourself or American Pacific Dairy Products during the time that the Dairy Queen was under the management of Siciliano or Pacific Enterprises, is that correct?

Mr. Phelan: I think that question is too broad. It is a couple of questions in one.

The Court: I think I understand the purpose of the [80] question which is that when you got these checks Pacific Enterprises or Siciliano was still operating the Dairy Queen?

A. While he was away from Guam, yes, we got the money. Sometimes they were addressed to American Pacific, sometimes to me personally. In either case they would come to the same address and I would open the envelopes.

Q. (By Mr. Bohn): And these checks we just talked about were before Norman Thompson took over as manager, is that correct?

A. Those were, yes, sir.

Q. I am going to ask you about a series of bank

(Testimony of Edward Thompson.)

drafts that were sent to you during this period. On July 13, 1952, did you or American Pacific Dairy Products receive the sum of \$506.60 in the form of a bank draft from the Dairy Queen of Guam?

A. \$555? Yes, it's earmarked Getz Brothers. It is possible it was sent to me; I don't know.

Q. The figure I have is \$506.60.

A. Yes, that went to American Pacific Dairy Products. Offhand I don't know what it was for.

Q. On September 29, 1952, did you or American Pacific Dairy Products receive an additional sum of \$2,149.88?

A. That is right, yes.

Q. And on the same day did you also receive an additional sum of \$5,415.50?

A. 15c this says.

Q. I have 50. Perhaps it is a typographical error, but [81] you did receive that amount or roughly that amount?

A. Yes.

Q. Did you receive an additional sum through a bank draft 10/6/52, of \$794.03?

A. Yes.

Q. And 10/12/52, the additional sum of \$245.55 in the same manner?

A. Yes, 65 it says here.

Q. On 10/27/52, did you receive an additional sum of \$363.20 in the same manner?

A. I did.

Q. And on 11/10/52, did you receive an additional sum of \$1,149.75 through bank draft?

A. Yes, I did. Now when you quote these dates they are the dates they were sent, not the date I received them, but I don't think that is important.

(Testimony of Edward Thompson.)

Q. 11/10/52, there was sent an additional sum of \$2,545.17?

A. It shows here—I received the money, yes.

Q. All of those bank drafts were sent to you by Mr. Henry Diza?

A. Sent to me or the corporation.

Q. American Pacific Dairy Products?

A. Yes.

Q. Now the checks were forwarded to you and signed by you in Seattle? [82]

A. That is correct. The amounts were put in but I signed the check.

Q. Now you have also received—withdraw the question. When did Mr. Norman Thompson take over the management of this business?

A. He landed here on Guam on April 22, 1953, and I don't think he took over immediately but he took over soon thereafter.

Q. Now since that time did you or Pacific Dairy Products receive the following sums from the Dairy Queen of Guam: September, 1953, \$5,000?

A. Let me look. Yes.

Q. And did you receive an additional \$5,000 in October, 1953? A. Yes.

Q. And did you receive in October, '53, also the additional amount of \$302.10?

A. No, sir.

Q. Could that have been received the following month?

A. No, they charged me back with \$302.10 which I was trying to collect.

(Testimony of Edward Thompson.)

Q. You did not receive that?

A. No, I charged the company with the same invoice twice and my son caught it.

Q. Did you receive the additional amount of \$105.09 in October, '53? [83]

A. No, sir, that is another duplication. I charged two invoices twice. It was adjusted and charged back to me. That is how it appears as a charge to me.

Q. In November, 1953, \$5,000?

A. Yes, sir.

Q. January, '54, the sum of \$36.91?

A. I did, yes.

Q. Also in January, '54, the additional sum of \$5,000?

A. That is right, yes.

Q. In April, '54, the additional sum of \$5,000?

A. Yes, sir.

Q. In May of '54, the additional sum of \$5,000?

A. Yes, sir.

Q. In June of '54, the additional sum of \$7,000?

A. That is right, yes, sir.

Q. In July of '54, the additional sum of \$5,000?

A. Yes, sir.

Q. In September of '54, the additional sum of \$5,000?

A. Yes, sir.

Q. And in October of '54, the additional sum of \$10,000?

A. Yes, sir.

Q. Now from your examination of the books and records and from your knowledge of this transac-

(Testimony of Edward Thompson.)

tion has Mr. Joseph Siciliano ever received any money whatever from this transaction?

A. No, he has received nothing that I know [84] of.

The Court: Does that answer also apply to Pacific Enterprises?

Mr. Bohn: I should have asked the question differently, your Honor.

Q. (By Mr. Bohn): Has the Pacific Enterprises ever received any money?

A. I think they received a few small amounts for supplies and that is all.

The Court: 12 o'clock, gentlemen. We will recess until 1:30. I again remind you I would like to have these pretrial orders either approved or corrected.

(The court recessed at 12:10 p.m., February 14, 1955, and reconvened at 1:30 p.m., February 14, 1955.)

The Court: Before you continue, what about the pretrial?

Mr. Phelan: On the one in this case on the findings of fact there are a couple I disagree with, Judge.

The Court: I beg your pardon?

Mr. Phelan: There are a couple of statements in the findings of fact that we haven't admitted, one of them on the second page of that pretrial order. We haven't admitted the building wasn't completed. At the top of the second page that para-

(Testimony of Edward Thompson.)

graph is confusing. We haven't admitted that. That's the plaintiff's contention.

The Court: Yes.

Mr. Phelan: But it is set up there, is it not, as if it [85] were an admitted fact at the pretrial?

The Court: No, the pretrial order, of course, merely recites what the plaintiff contended at the pretrial conference. It couldn't mean that you admitted it.

Mr. Phelan: No, I didn't intend to admit anything.

The Court: No, you didn't so I don't think that is material. What else did you have in mind? The important thing is whether it correctly states your contentions.

Mr. Phelan: May I see it for a second. I haven't got my copy with me.

The Court: Yes.

Mr. Phelan: My contentions are correct, yes.

The Court: Yes, well then that's all that you are concerned with. Will you take the stand, Mr. Thompson, please. Continue, Mr. Bohn.

Mr. Bohn: Before continuing with this witness, your Honor, I would like to state to the court that we made a hasty calculation of the total of those figures about which I asked this witness this morning—the amounts received by himself or American Pacific Dairy Products. I would like to state that if our findings are correct and subject to whatever mathematical corrections may be needed, the total amount is \$118,979.44.

(Testimony of Edward Thompson.)

The Court: Now that is the entire——

Mr. Bohn: That represents the sum total of all the amounts I asked him about this morning, checks or bank drafts [86] which were sent to him or American Pacific.

The Court: Yes, you got him through 1953 and 1954?

Mr. Bohn: That is correct, for the whole period of operation. In other words, part of it was for the period of time that the Siciliano organization was operating and part of the figures were for the time Norman Thompson was operating.

The Court: In other words, your contention is that \$118,979.44 has been sent to Seattle?

Mr. Bohn: That is correct, your Honor.

Mr. Phelan: The way that is set up, I think is confusing because some checks, it was testified, were drawn to the corporation and some to Mr. Thompson personally. I think it should be broken down.

The Court: Well, we have nothing before us at the present time as to how this money was distributed. It is conceded that part of it was for the purchase of supplies.

Mr. Phelan: Yes, but it was testified that some of those checks were drawn to the order of the corporation and others drawn to Mr. Thompson's order.

The Court: Yes, it was made clear that these transmittals did not distinguish between Mr. Thompson and the corporation.

Mr. Phelan: It wasn't made clear to me.

(Testimony of Edward Thompson.)

The Court: They considered them interchangeable. In other words, if it was profit and it was sent to Mr. Thompson then I presume that he paid it into the corporation. [87]

Mr. Phelan: There is no contention any profit was sent to anybody.

The Court: Well, you have the opportunity now to show what Mr. Thompson did with the money.

Mr. Phelan: First of all I want the figures to show how much he got and how much the corporation got.

The Court: Well, if they made notes they will try to advise you of that and anyway, I strongly suspect Mr. Thompson is in a much better position than any of us to advise of that. He is an accountant. This was my suggestion; I wanted to find out what the total was.

Q. (By Mr. Bohn): Now, Mr. Thompson, you have in those records before you a list of monthly—series of monthly reports setting forth gross sales, profit, trial balances, and various monthly figures, is that correct? A. I don't know.

Q. I beg your pardon?

A. I said I don't know; I will have to look. We have a number of them. I don't know whether they are complete or not, but I have some in here, yes.

Q. May I see them, please? A. Yes.

Mr. Bohn: I apologize to the court for being a little clumsy about this. I think I will ask him questions and ask Mr. Thompson to find the [88] reports.

(Testimony of Edward Thompson.)

The Court: You don't expect to take up the time of the court, do you, while Mr. Thompson looks through a whole series of reports until he finds the one to which you refer?

Mr. Bohn: Well, I have it in my record. I think he has reports for every month the business operated except one, and I want to get that information before the court.

The Court: Well, proceed.

Q. (By Mr. Bohn): Mr. Thompson, I will ask you to look at that series of reports and is there a report there for the period ending June 30, 1952?

A. I have a trial balance; it's a trial balance.

Q. A trial balance? A. Yes.

Q. And that trial balance shows sales from June 22, 1952, to June 30, 1952, of \$3,006.65, is that correct? A. Yes, sir.

Q. All right. Do you also have a trial balance for the period ending July 31, 1952?

A. Yes, I have that.

Q. And does that show cumulative sales as of that date of \$13,161.70? A. Yes.

Q. Do you also have a cumulative report for the period June 22, 1952, to 8/31/52, which would be August 31, 1952, showing total cumulative sales as of that date in the amount of \$20,570.10? [89]

The Court: Now are you talking about cumulative sales?

Mr. Bohn: That is correct.

The Court: From June 22?

Mr. Bohn: That is correct.

(Testimony of Edward Thompson.)

The Court: To August 31?

Mr. Bohn: These reports are made in the form of accumulation. They started on June 22 and then each month the previous month is added so you get an accumulated total.

The Court: Now this is your gross?

Mr. Bohn: That is correct.

The Court: And that is August 31?

Mr. Bohn: August 31 I asked if the total was not \$20,570.10?

Mr. Thompson: That is right.

Q. (By Mr. Bohn): Do you have a fourth report, trial balance, showing the total sales and the estimated profit from June 22, 1952, to September 30, 1952?

The Court: Now all you are putting in the record here is your gross sales. You are asking him now about profit.

Mr. Bohn: This is the first report that profit was shown. That is why I didn't ask him that on previous question.

The Court: That is what date?

Mr. Bohn: September 30, 1952.

Mr. Thompson: Oh, yes, here is the estimated profit.

Q. (By Mr. Bohn): Were the total sales to that date [90] \$28,817.80? A. \$28,817.80, yes.

Q. And was the estimated profit as of that date \$13,235.30? A. Yes, sir.

Q. Calling your attention to the fifth report, that

(Testimony of Edward Thompson.)

is for the period ending October 31, 1952, from June 22, 1952, to October 31, 1952—

A. Yes, all of these were prepared by Diza.

Q. That was going to be my next question. All these reports we are now talking about were prepared by Henry Diza?

A. That is correct, sir.

Q. What does that report show?

A. What date is that?

Q. That is as of October 31, 1952, \$32,467.90?

A. Yes.

Q. Does that report include a profit and loss statement which shows a profit of \$13,612.50?

A. Yes, sir.

Q. And do you have in your possession a sixth report for the period ending November 30, 1952?

A. Yes.

Q. And the gross sales up to that date as shown by that report are \$40,551.85?

A. Yes, sir. [91]

Q. And the total profit as of that date is stated as \$16,631.16? A. Yes, sir.

Q. And do you have a seventh report, also prepared by Diza, showing the period ending December 31, 1952? A. Yes.

Q. And does that report indicate a total of sales to that date of \$49,091.78? A. Yes, sir.

Q. And does it also show an adjusted profit of \$15,887.98? A. Yes, sir.

Q. Was that an end-of-the-year adjustment according to that report?

(Testimony of Edward Thompson.)

A. No, there was an error in the report.

Q. Now do you also have in your possession an eighth report for the period from the beginning of that business to January 31, 1953?

A. January 31, 1953?

Q. Yes, sir. A. Yes.

Q. And as of that date does the report indicate total sales accumulated as \$57,626.08?

A. That is right.

Q. And profit accumulated to that date of \$21,986.83? A. That is right, yes. [92]

Q. And do you also have a ninth report for the period ending February 28, 1953? A. Yes.

Q. And is it true that that report indicates total sales of \$64,416.63? A. Yes, sir.

Q. And does it also indicate a profit as of that date of \$24,219.74?

A. That is what the figures show here on these reports.

Q. And do you have a tenth report also for the period ending March 31, 1953? A. Yes.

Q. And does that indicate gross sales as of that date of \$73,067.83? A. That is right.

Q. And profit of \$29,440.62?

A. That is right.

Q. Now that report was for the period ending March 31, 1953. Is it true, Mr. Thompson, that your son, Norman Thompson, took over the management of the business and reporting as of April 22, 1953?

A. No, he landed on Guam April 22, so I would say it was after that date. These reports for '53

(Testimony of Edward Thompson.)

Norman made them. The books hadn't been written up since the year before.

Q. So the last report Norman compiled? [93]

A. He compiled January, February, March and April and the rest.

Q. So the figures were given to him and he compiled them from the information he had?

A. Yes.

Q. There is also a report, is there not, for the period ending April 30, 1953, showing total sales, \$81,361.03?

A. That is right.

Q. And profit as of that date, \$30,823.04?

A. That is right, yes.

Q. And there is a further report for the period ending May 31, 1953, showing total sales, \$91,806.67?

A. Yes.

Q. And profit, \$31,403.47?

A. That is right.

Q. That was reported by Norman Thompson also?

The Court: What was that last figure?

Mr. Bohn: Profit, \$31,403.47.

Q. (By Mr. Bohn): Do you have a report available for the period ending June 30, 1953?

A. There should be one but I haven't found it yet. That seems to be missing.

Q. As a matter of fact, Mr. Thompson, you know it's missing, don't you? A. No. [94]

Q. When was the last time you saw that report?

A. June 30? I don't know. Did I see it?

Q. I don't know. I am asking you.

(Testimony of Edward Thompson.)

A. These I haven't the slightest idea I ever saw them before. These were prepared and kept here.

Q. They were never sent to you?

A. Copies were.

Q. Do you recall having seen a copy of any report for the period ending June 30, 1953?

A. I should have but I don't remember right now, no.

Q. Will you check your general ledger and tell us what is in the general ledger for the period ending June 30, 1953?

A. Oh, that is right. There is nothing in the general ledger for that month.

Q. Will you check your cash book and tell us if there is anything in that?

A. There is none there, no.

Q. This was the period that Norman Thompson was keeping the books?

A. At that time I was keeping the books in Seattle. I was going to send duplicates to him. In July, 1953, I think I sent him the reports in Seattle and they should be over here.

Q. Those are the records that were missing?

A. Some of them, yes. I assume mine are exact copies of these but I don't know. [95]

Q. Are these the reports lost in the mail as mentioned by your previous affidavit?

A. Yes, sir. I assumed they were lost. We got one package today with some stuff in it but not these reports.

(Testimony of Edward Thompson.)

Q. When was the last time you inquired at the post office as to these missing reports?

A. We went in there this morning and we got one package off the Luckenbach.

Q. Prior to that when was the last time?

A. My son has been going in.

Q. Did you make the inquiry this morning?

A. Yes.

Q. Were you with him? A. No.

Q. So you don't know whether he did or not?

A. Yes, he came home with a package.

Q. I am going to show you, Mr. Thompson, an affidavit which has been previously filed in this court, a copy of which was served on me. It is dated February 8, 1955, and I am going to ask you to read that affidavit—not aloud but glance through it and see if that is your signature?

A. That is right. That's my signature.

Q. Now in that affidavit you stated substantially as follows: That prior to your departure from Seattle on the 27th day of December, 1954, that you directed that there be mailed by [96] means of United States Mail, postage prepaid, a package containing numerous documents, duplicate invoices, letters and other papers from the file of the corporation maintained at the main office, City of Seattle, State of Washington, addressed to the office of the corporation of the Dairy Queen of Guam; and despite every attempt to locate this package, it has never been received and cannot be located in the United States Post Office.

(Testimony of Edward Thompson.)

A. If I said "a" package, there were more than one package; there were seven packages sent.

Q. And how many of the packages were lost?

A. There were two lost up to this morning but we have gotten all but one now.

Q. When was the last time you received any?

A. A week or so ago, I guess.

Q. When was the last time you made inquiry for documents at the Post Office?

A. Well, I actually didn't make inquiry. Norman knows the men down at the Post Office. He would say "We are looking for packages. Give another look." Usually he got to slip down to the Post Office pretty often.

Q. Wasn't the last time February 3, 1955?

A. That is not true.

Q. Is it not a fact that on February 3, 1955, there was delivered to you a package from the Post Office, is that correct?

A. Oh, I got a number of packages. I don't know whether [97] it was February 3, or not. Yes, I received probably ten packages from the States since I have been here.

Q. And is it not also a fact that you stated these are the documents you had been looking for?

A. No. I might have said so. This is one of them but that was not all of the packages.

Q. Is it not a fact that prior to February 3 you personally made several inquiries at the Post Office?

(Testimony of Edward Thompson.)

A. No, my son made all of them. I was standing there but he made the inquiries.

Q. Is it not also a fact that you have never made any inquiries since February 3—between February 3 and the date of this affidavit, February 8?

A. That is not true, no, sir.

Q. Now let's get back to the report for the month of June, 1953. Do you state to this court that report is part of the missing documents?

A. I don't know whether I made a report for June, '53, or sent a copy over here or not. I took off a trial balance and opened up a set of books for Guam and sent them over here.

Q. Will you find the entries for June, '53.

A. They are not in there because I started with July.

Q. Do you have any knowledge as to the figures for June?

A. I forgot for a moment that I didn't have complete records here. Those are in my file in Seattle. [98]

Q. You have no independent recollection of them?

A. No, sir, except by the process of elimination. Take July and go back.

Q. Let's take July. Do you have a report for the period ending July 31, 1953? A. Yes.

Q. And what were the—withdraw that question. Does that report indicate gross sales for the period June 22, '52, to July 31, '53, total gross sales of \$91,298.17, is that right? A. Yes.

(Testimony of Edward Thompson.)

Q. And does it also indicate a profit as of that whole period of \$16,077.36?

A. Yes, sir. No, not for that whole period.

Q. What is that profit figure?

A. This one my son made up. That is what it showed but it's wrong; I can tell you that.

Q. What is the right figure for that period?

A. July, '53? It should probably be \$26,326.80.

Q. It should be \$26,000 but it's \$16,000?

The Court: What period are we talking about now?

Mr. Bohn: We are talking about the period June 22, 1952, to July 31, 1953, accumulated sales and accumulated total profit.

The Court: According to the statements here as of May 31 you had accumulated total sales of \$91,806 and profit, \$31,403. [99]

Mr. Bohn: That was going to be my next question—what happened to the sales and what happened to the profit for the months of June and July?

The Court: Now you claim that there is a statement as of when?

Mr. Bohn: I do not know, your Honor. I only claim Mr. Thompson has verified that there is no report for the month of June, 1953, and I respectfully point out to the court that the reports of Norman Thompson as of May 31 indicate sales of \$91,806.67. The next report we find in the file, two months later, indicates gross accumulated sales of \$91,298.17.

(Testimony of Edward Thompson.)

The Court: Yes, I understand. You are asking for a reconciliation.

Q. (By Mr. Bohm): Can you reconcile those figures for us, Mr. Thompson?

A. In a moment I can, yes; I think I can. Yes, this report is wrong.

Q. Which report is wrong?

A. The one that Norman made.

Q. As of what month?

A. As of July 31, '53. The profits are down considerably because he left out the inventory.

Q. Yes, will you explain?

A. I can see it now as cost of goods sold. He had mix, \$1,281.29. That was the total amount of mix and there was still [100] mix on hand that should have been deducted from the total cost of the mix.

The Court: That would have no bearing on sales?

A. No. Now I will go back to sales. When Norman took it over we went back and filed tax returns on the corporation on the theory the partnership had never been consummated. The corporation had a fiscal year ending in August so the sales of June, '52, July and August would be deducted from this amount. You follow me, your honor?

The Court: Yes.

A. If you add those sales for those three months it would be considerably more than the \$91,000 shown.

Q. (By Mr. Bohm): What do your records

(Testimony of Edward Thompson.)

show the total accumulated sales were as of July 31, 1953?

A. They do not show because we cut them off as of August 31, 1952, and then started again.

Q. Well, then, let me see that report.

Mr. Phelan: It seems to me we are off on the wrong tack here. Mr. Bohn is trying to account for the period when Mr. Siciliano had control of it from Mr. Thompson. I think all Mr. Thompson can do is say what the books show—

The Court: I am afraid you haven't been following the testimony, Mr. Phelan.

Mr. Phelan: Yes, I have.

The Court: The testimony is while Mr. Siciliano was [101] running it they got the monthly statement of gross sales and profits and they have made reference to those. In April of '53 Mr. Siciliano or the Pacific Enterprises had nothing to do with it. Mr. Norman Thompson took over and we are now dealing with a period where we have no accounting after Norman Thompson took over.

Mr. Phelan: Yes, what I meant was that these are cumulative figures month by month and in the early months all he can tell us is what the figures are. We have nothing but what is on a piece of paper. It's all based on that.

The Court: Yes, it appears that you admit you received over \$100,000 so somewhere along the line it has to tie in.

Mr. Phelan: Yes, I realize that but—

The Court: To be short, Mr. Bohn is asking this

(Testimony of Edward Thompson.)

witness why adequate records were not kept for June and July and August.

Mr. Phelan: That is perfectly all right as far as I am concerned but the figures from June of '52 were cumulative figures and they are based upon entries in the book and all he can do is read the entries off.

The Court: These are based upon reports.

Mr. Phelan: But a report is only a conclusion, your Honor.

The Court: A report, of course, may be a conclusion, but as an accountant I am sure this witness will agree that if he receives a balance and loss statement for a month's business [102] he assumes that the reports have been taken from the proper books of entry.

Mr. Phelan: Yes, but I don't see how he can testify as to those first ones as to their accuracy.

The Court: He is not testifying as to their accuracy; he is just testifying as to what he received.

Mr. Phelan: I just want to get that in the record.

Q. (By Mr. Bohn): Let's get back to this statement, the profit and loss statement for July, 1953, and the financial statement, July 31, 1953. This profit and loss statement contains a notation on it in pencil reading as follows: "Copy of what I sent to dad." Is that in the handwriting of Norman Thompson? A. Yes.

Q. And that is what he sent to you?

A. I assume it is, yes.

(Testimony of Edward Thompson.)

Q. Are you certain? A. That is right, yes.

Q. Now will you examine this and tell us if that is what he sent to you?

A. I can't remember whether this is exactly what was sent to me; I assume it is and I believe him but that is all. I can't tell whether this was sent to me.

Q. Now in this profit and loss statement there is a statement, sales \$91,298.17? [103]

A. That is right, sir.

Q. Will you check whatever records you have and tell us what period is covered by that item?

A. I can tell you it is the period from June 22, 1952, through July 31, 1953.

Q. Where are there any reports in the books to show the sales and profit between the period June 30 and September 1, of '52?

A. Well, those are in the Seattle office. No—between June 30—

Q. From the date the Dairy Queen opened to the period you now state you used as a cut-off period in '52. Where are the records on that period?

A. August 31, '52—we just called those off.

Q. Those are the figures? A. Yes.

Q. Then as of July 31, '53, the total sales figure of \$91,298 does not represent the complete amount of total sales from the beginning of operations to that period? A. No, sir.

The Court: I want to get this clarified. That represents then a corporate figure based upon their

(Testimony of Edward Thompson.)

fiscal year? A. That is right, sir.

The Court: And has nothing whatever to do with the accurate reports or with the conditions which may have prevailed [104] at the Dairy Queen in terms of local bookkeeping?

A. Oh, yes, it does but we cut off the fiscal year as of August 31, '52, because that is the corporation's fiscal year.

The Court: Yes and presumably figures for the months of June, July and August appeared in your previous report?

A. That is correct, sir. We didn't actually make the report up, but if you add to those sales the sales we eliminated, you will get the total sales for that period.

Q. (By Mr. Bohn): Do you have anywhere anything indicating—withdraw that question. What did you do with the profit which was earned between June, '52, and August 31, '52? Did you make a tax return for that period?

A. August 31, '52? We made a return, yes.

Q. What was the profit shown at that time?

A. I don't remember.

Q. Do you have those records here?

A. No, they would be in Mr. Little's office. He is secretary-treasurer.

Q. So all those records are in Seattle?

A. Of course they were filed on Gaum, the original, but the copies of the tax returns are in Mr. Little's office.

(Testimony of Edward Thompson.)

Q. Now if these reports are accurate there would have been total sales of \$20,570.10 as of August 31, 1952? A. That is about right, yes.

Q. You do not know what the profit was? [105]

A. No.

Q. Are there anywhere in those books any indications what the profit was?

A. In the Seattle books, yes.

Q. But not in the books here?

A. They started as of July 31, '53.

Q. Do you not maintain any books on Guam indicating total sales and what profits were made?

A. It is possible in the books Henry kept. I don't know.

Q. I am asking you now what you have. Do you have anywhere on Guam any books that would indicate how much money was made for the period ending August 31, 1952? A. No.

Q. You do not know how much profit was made for that period?

A. If the books wouldn't show it, no.

The Court: Now, before we get too confused here, what is your figure as of September 20, 1952, of total sales of \$28,817, and profit of \$13,325? Would that be exclusive of every month except September?

Mr. Bohn: Yes, those were and those were the reports prepared by Mr. Diza and the purpose of my last question—apparently—I say apparently—maybe I am not entitled to make that assumption—what they did was to take these documents back

(Testimony of Edward Thompson.)

there and make a series of adjustments on them. [106]

The Court: Bear this in mind that you have to exclude from the reports prepared by the corporation the months of June, July and August of 1952, then you should be on an annual basis beginning as of the 1st of September, 1952.

Mr. Bohn: That is correct.

The Court: So that all we have in dispute then is the period from June 22, to August 31, '52, and you have your accurate figures on that.

Mr. Bohn: We have them from our report, yes.

Q. (By Mr. Bohn): Now to go one step further then—perhaps this is a duplicate question. If so I am sorry. The reports that you have testified to so far indicate as of May 31, gross sales of \$91,000 plus and as of July 31, \$91,000, somewhat less than the previous report. You stated that the reason for that differential is that it reflects a different period of time and that the figure, \$91,298.17, is for the total sales to July 31, '53?

A. That is correct, yes, sir.

Q. Now you have in the same balance sheet—what figure did you put in there as surplus?

A. He says “surplus using your figures, \$26,326.80.”

Q. Well, now at that time I assume surplus is profit of \$26,000? A. That is right, sir.

Q. Now that plus the profit made for the months of June, [107] July, August, '52—

A. Yes, sir.

(Testimony of Edward Thompson.)

Q. In addition to that figure?

A. No, sir, that is the profit up to July 31, '53, according to this statement.

Q. Let me ask the question another way, then. The report prepared by Mr. Norman Thompson for May 31, indicates a profit of \$31,403.57?

A. That is right.

Q. You stated you made adjustments because you changed to the fiscal year. How do you account—withdraw the question. Will you please reconcile the \$26,000, surplus figure, which you show, with the profit reported for the previous month? A. Which was that?

Q. Well, the profit as of May 31, according to these reports was \$31,403.

A. I don't know whether this is correct or not. He says "using your figures." I notice on the financial statement there is no inventory. This might be wrong, you know. I can't tell offhand.

Q. Well, Do you have a statement that is right?

A. Probably the following month. I haven't looked at that. He shows a surplus of \$26,326?

Q. Something like that, yes. May I borrow it?

A. You want the June? [108]

Q. July 31. I understand there are no reports for June? A. That is correct, sir, yes.

Q. On the financial statement you show a surplus and the language in parentheses is "using your figures"? A. Um huh.

Q. That was prepared by Norman Thompson, wasn't it? A. Yes.

(Testimony of Edward Thompson.)

Q. It is a fair assumption when he says "using your figures," he means yours, Edward Thompson's? A. I think it is so, yes.

Q. That is \$26,000 some odd. Now, turning to the profit and loss statement, it also contains the notation "copy of what I sent to Dad." There is the statement "net profit for the period, \$16,077.36." Now, is that the net profit in addition to the \$26,000 surplus?

A. No; that net profit figure is wrong, of course.

Q. Well, I am just asking you how it was arrived at.

A. I didn't arrive at it. I couldn't tell you how he got it, but I can see a discrepancy.

Q. I concur. Proceeding then to the next report which is as of August 31, 1953, do you have a report there showing gross sales of \$99,607.42?

A. That is right, sir, yes.

Q. And a profit of \$26,966.70?

A. \$26,966.70 did you say? [109]

Q. Is that right, \$26,966.70?

A. This has been scratched up. \$26,966.70, yes, I do see it, yes.

Q. Now, what period of time does that profit figure represent, from when to when?

A. That represents the year ending August 31, 1953, from September 1, '52.

Q. And it was in addition to any profit that has been earned prior to September 1, '52?

A. Yes, sir.

(Testimony of Edward Thompson.)

Q. May I see it again? I would like to see the July 31 one. Now, in the July 31 one you show a surplus "using your figures" of \$26,326.80. That you testified was the profit in—

A. I didn't testify that was what showed as profit. I didn't audit these books.

Q. Can you reconcile or explain the fact that your August 31 figure for total profit for the period is within a very few dollars of your surplus as of July 31?

A. No; I can't explain. I don't know the answer to that.

Q. We will now proceed with the permission of the court to the next report. You have a report for the month of September, 1953, is that correct?

A. Yes, sir.

Q. You started a new year at that time, is that right?

A. That is correct, yes. [110]

Q. In that report you show sales of \$7,845.00?

A. That is right, yes.

Q. And it shows profit for the month of September, \$2,133.15?

A. Yes, sir.

Q. And do you also have a report there for the period from September 1, '53, to October 31, '53, showing total amount of accumulated sales, \$15,312.79?

A. What date?

Q. October 31.

A. Oh, October 31. You jumped.

Q. Well, I didn't mean to jump. I meant my prior figure to be for the month of September and

(Testimony of Edward Thompson.)

this is the second report in the new year. That would be for the period ending October 31, '53?

A. That is \$15,312.79.

Q. And the profit, \$4,381.06?

A. That is right, yes.

Q. Do you also have a report there for the period, September 1, '53, to November 30, '53?

A. That is right, sir, yes.

Q. Sales, \$22,564.24? A. That is right.

Q. Profit, \$5,476.72?

A. That is right. [111]

Q. And you also have a report for the period September 1, '53, to December 31, '53?

A. That is right.

Q. Showing sales accumulated from the September 1 date of \$29,295.89? A. That is right.

Q. And a profit in the second year to that date of \$6,420.45? A. That is right.

Q. You also have a report there for the period September 1, '53, to January 31, '54?

A. That is right.

Q. Showing total sales, \$35,946.75?

A. That is right.

Q. And profit, \$7,915.26?

A. That is right, sir.

Q. And you have a report for the period September 1, '53, to February 28, '54?

A. I have it.

Q. Sales, \$42,031.07? A. I have it.

Q. And accumulated profit for the second year,

(Testimony of Edward Thompson.)

or, rather, for the period beginning September 1, '53, to February 28, '54, of \$8,471.17?

A. Yes, sir. [112]

Q. You have a report for the period September 1, '53, through March 31, '54?

A. I have it, yes.

Q. Does that report indicate sales of \$48,723.93?

A. That is right.

Q. Profit from September 1, '53, to March 31, '54, of \$9,465.68? A. Yes.

Q. You have a report there for the period from September 1, '53, to April 30, '54? A. Yes.

Q. Sales, \$55,193.13? A. That is right.

Q. Profit, \$10,311.33? A. Yes.

Q. And you have the same information for the period ending May 31, '54? A. Yes.

Q. Sales, \$61,779.43? A. That is right.

Q. Profit, \$11,262.20?

A. That is correct, sir.

Q. You also have a report for the period ending June 30, '54? A. That is right. [113]

Q. Sales, \$68,162.33? A. That is right.

Q. Profit, \$12,914.45?

A. What was that again?

Q. I am sorry—\$12,914.45. A. Um huh.

Q. July 31, '54, sales, \$75,171.98?

A. That is right.

Q. Profit, \$15,091.96?

A. That is right, sir.

Q. August 31, '54, from September 1, '53, sales, \$81,000.73? A. That is right, sir.

(Testimony of Edward Thompson.)

Q. August 31, '54, from September 1, '53, profit, \$16,590.03? A. That is right.

Q. Now, did you close your books as that is the end of the fiscal year again? A. That is right.

Q. Now, from your records, what was the total recorded this business made from the beginning of its organization to that period, August 31, '54?

A. Net profit after income taxes, \$29,359.17. The ledger shows that after income taxes.

Q. That includes—

A. Everything. [114]

Q. That includes everything?

A. From the beginning.

Q. From the beginning. It includes the figure of \$13,235.30? No, withdraw that question. It includes the report from the period June 22 to September 1, '52, is that correct? A. Yes.

Q. It includes the period of time from September 1, '52, to August 31, '53?

A. That is right, yes.

Q. And it includes the period of time from September 1, '53, to August 31, '54?

A. That is right, yes.

Q. Less taxes? A. After taxes, yes.

Q. What were the total amounts of income tax paid for each of those three periods?

A. I don't have it—only for the last period.

The Court: Was this income tax paid in Guam?

A. Paid on Guam, yes.

The Court: You had no income in the United States?

(Testimony of Edward Thompson.)

A. No, sir. For the last fiscal year we paid \$8,500 plus, roughly.

Q. (By Mr. Bohn): You paid \$8,500 income tax for the period ending August 31, '54, is that correct?

A. That isn't an exact figure, but it is fairly close. [115]

Q. That would presuppose a gross profit of about what?

A. I couldn't say. I would have to see the income tax returns.

Q. Do you have those income tax returns with you?

A. No, sir; they are in Mr. Little's office.

Q. He is the one who keeps them? Who prepares them?

A. I do and he goes over them and checks, but I prepare them.

Q. What do your books show as profit for the year September 1, 1953, to August 31, 1954, after taxes?

A. I would have to analyze these books. We don't have any one lump figure here. We credit profit with the sales and we charge profit and loss with the expenditures and income tax we charge profit and loss also.

Q. Your books do not reflect how much money this business made from September 1, 1953, to August 31, 1954?

A. It does but not in one figure. I can reach out but I would have to make substantiations.

(Testimony of Edward Thompson.)

Q. Perhaps we can make those later on. Do your books show how much taxes were in the year ending August 31, '53?

A. Wait a minute—this \$8,000 taxes was for '53.

Q. For '53?

A. Yes; I got the wrong numbers.

Q. Do you have any figures as to your profits before taxes for the year September 1, 1952, to August 31, '53? [116]

A. Yes; we have those. I would have to figure those.

Q. You can figure that later on?

A. Yes; it is a short analysis but I would have to make it.

Q. How much tax did you pay for the year ending August 31, '54?

A. Considerably less than the first payment. We only paid the first installment which amounted to \$1,689.55.

Q. How many installments are due?

A. I don't know. Norman can tell you. I can see what's been paid and that is all; I don't know.

Q. You paid \$8,500 for the period September 1, 1952, to August 31, 1953? A. Yes.

Q. And you paid \$1,600 on account on monies owing for the next year? A. That is right.

Q. And the balance is still due?

A. That is right.

Q. When is it paid? A. Quarterly.

Q. You made the first payment when?

A. November.

(Testimony of Edward Thompson.)

Q. And when is the next payment due?

A. February or March.

Q. Well, three months? [117]

A. February some time, yes.

Q. Has it been paid?

A. I don't know whether it has been paid or not.

Q. Do your books reflect whether it has been paid? A. They haven't been posted as paid.

Q. I am just asking you what is in your books.

A. No; I don't think it has been paid but I wouldn't know. They send us a notice.

Q. Getting back to this series of reports, do you have a report there for the period—I beg your pardon—for the month of September, 1954?

A. Yes, sir.

Q. And does that indicate sales of \$4,324.15?

A. That is right, yes.

Q. And does it indicate a loss of \$2,339.94 for that month?

A. That is what it indicates but that is not true.

Q. What is the true figure?

A. Here is what happened: There was an error in inventory and he caught it after he sent in this report. We knew we didn't lose that money. What happened, he figured the inventory at a thousand instead of per case.

Q. You picked it up when he sent it to you?

A. I checked it back. It didn't make sense to me.

Q. You checked them? [118]

A. Yes; the one Henry sent to me showed a loss of \$5,000 and I wrote him and told him it was obvi-

(Testimony of Edward Thompson.)

ously wrong. I wrote him and told him and he found he had omitted——

Q. Let's find the report where he showed the loss of \$5,000.

A. It wouldn't show a loss of \$5,000 on that report but on the cumulative report.

Q. Accumulated profit of \$15,887.98?

A. Wait a minute now—after correction.

Q. After correction?

A. Yes; this was corrected after I called attention to the mistake. I can show by analyzing it, I hope. I am speaking before I look. We had a loss of \$5,200 in the month of December, 1952. Well, that is obviously a mistake. I know I wrote them and told them to check back and they found it.

Q. As a matter of fact, as a certified public accountant, if you find errors you notify them?

A. Yes.

Q. That is true throughout the whole operation?

A. Sure.

Q. And the report we were talking about showed a loss and you state that was in error?

A. Yes.

Q. You don't have a corrected report there?

A. We didn't make a corrected report. [119]

Q. Now, for the period from September 1, '54, to October 31, '54, do you have a report there?

A. Yes, sir.

Q. You show accumulated sales of \$9,167.65?

A. Yes.

Q. And net loss, accumulated loss, of \$1,347.54?

(Testimony of Edward Thompson.)

A. That is right, yes, sir.

Q. Do you have another report for the period September 1, '54, to November 30, '54?

A. I will have to look. I don't see that one; it doesn't mean it isn't here, but I can't see it here.

Q. Well, in the interests of saving time, would this refresh your memory? My notes on the report state that the total sales from September 1, '54, to November 30, '54, as indicated in this report, are \$13,937.40?

A. I would say that is very close.

Q. And the net loss for this period was \$2,200.32?

A. That is right, yes.

Q. Now, I don't wish to put words in your mouth. Is that correct?

A. That is close to it. Sales dropped off sharply in the last four or five months.

Q. Do you have a report for December?

A. No, I haven't. It hasn't been made yet.

Q. It hasn't been made yet? [120]

A. No.

Q. Do you have postings for profit or loss for the period ending December 31, '54, in your ledger?

A. Yes; they are posted.

Q. What are they?

A. I would have to make up a report. Those profit and loss reports are made from a work sheet and that hasn't been done yet.

Q. It has been posted?

A. Yes.

Q. The ledger has been posted but the report has not been prepared?

A. Yes.

Q. You are a month or two behind on that?

(Testimony of Edward Thompson.)

A. Probably because I was here and I have taken up some of his time.

Q. Now, Mr. Thompson, is it true that beginning on or about November 30, 1953, and continuing through December, 1954, various sums totaling \$26,-740.63 were spent for the benefit of a corporation known as Guam Frozen Products, Inc.?

Mr. Phelan: By who? I think you should make clear who spent the money.

Mr. Bohn: Well, first of all, let's find out if it was spent by Dairy Queen. Let's find out if it was spent.

A. American Pacific spent the money. [121]

Q. (By Mr. Bohn): Now, the funds were taken from the funds of the Dairy Queen of Guam, is that correct?

A. The funds were taken from American Pacific Dairy Products but the funds of Dairy Queen were put in the American Pacific Dairy Products.

Q. When did you establish a bank account?

A. Shortly after Norman Thompson got here.

Q. So all the receipts of the Dairy Queen went into an account known as American Pacific Dairy Products? A. Yes.

Q. Did anything other than receipts from the Dairy Queen of Guam go into that account?

A. I couldn't say. Miscellaneous receipts would go in there, yes.

Q. From what source?

A. Any source; I don't know.

(Testimony of Edward Thompson.)

Q. What line of business is American Pacific Dairy in?

A. No other line of business. If there was miscellaneous receipts they would go in there but I don't know of any miscellaneous receipts.

Q. So your testimony is that all the money in the account of American Pacific Dairy Products established in the Bank of America, Agana, Guam, came from Dairy Queen, is that correct?

A. I would say so, yes. [122]

Q. Well, is that wrong?

A. No; it is right.

Q. Now, from that account there was spent \$26,740.63 for the benefit of a corporation known as Guam Frozen Products, Inc.?

A. That is right, sir, yes.

Q. When did those expenditures start?

A. The first one was in November, 1953.

Q. And they continued, roughly, a certain amount each month on through December, 1954?

A. In smaller amounts, yes.

Q. The cumulative total was \$26,740.63? Does that represent the total expenditures?

A. No; that represents the total amount charged there. Oh, yes, we have a total here as charged to the account of \$26,740.63. Included in that was \$3,200.27 of supplies like mix, containers and so forth but the store was not opened promptly. We had trouble getting it open so we took them back to the warehouse and used them in the other store so the correct amount spent was about \$23,000 plus.

(Testimony of Edward Thompson.)

Q. And the difference was for supplies ordered by Dairy Queen operation, delivered by the Dairy Queen operation to Guam Frozen Products and then taken back because they weren't ready to open?

A. We don't call it Dairy Queen. We call it American Pacific Dairy. [123]

Q. The sign is "Dairy Queen."

A. The store is the Dairy Queen.

Q. Do you have a cancelled certificate of co-partnership agreement filed with the Government of Guam? A. No.

Q. To your knowledge is that still in existence?

A. I haven't the slightest idea.

Q. It is possible the public, at least, thinks this is still a partnership operated by American Pacific Dairy and Joseph Siciliano?

A. I don't think the public would go down and read the articles of incorporation. I don't know what the public believes.

Q. I am stating that this was a partnership and you were doing business under the fictitious name of Dairy Queen of Guam——

A. I didn't cancel that. I said that before.

Q. Do your books show a credit in the account of Guam Frozen Products in the amount of \$17,500?

A. Yes, sir.

Q. And does that show it was credited to Guam Frozen Products in exchange for stock?

A. Yes, sir.

Q. And stock was actually issued?

A. Yes, sir.

(Testimony of Edward Thompson.)

Q. Stock in Guam Frozen Products was issued to who? [124]

A. The greater part was issued to American Pacific Dairy Products, one share issued to Norman Thompson and one share issued to me.

Q. And the balance issued to American Pacific Dairy Products? A. Yes, that is right.

Q. Now, the difference between the \$17,500 stock purchase and the balance spent out of this account—how is that accounted for?

A. That is accounts receivable. At the end of December it amounted to \$5,644.18.

Q. And it is still owed?

A. Still due from Guam Frozen Products.

Q. Has it been paid since?

A. No; it should have been and could have been but it hasn't been paid.

Q. Who are the stockholders in Guam Frozen Products?

A. Mrs. Litch, Mrs. E. W. Litch, and I think Mr. Phelan is a stockholder. He can answer as to the rest better than I can. We have qualifying shares or directors.

Q. Who are the substantial owners?

A. American Pacific Dairy Products, Mrs. Litch and Dick R. Hevessy. He was manager of Luzon Stevedoring Company. How they divided that stock I don't know.

Q. When did Guam Frozen Products open their store? [125]

A. I would say just before September, 1954.

(Testimony of Edward Thompson.)

Q. Just before September? A. Yes, sir.

Q. If I am correct, your previous testimony was that it was in the month of September, 1954, that the Dairy Queen of Guam began to lose money, the first store?

A. I don't think there is any connection there.

Q. Just answer the question. A. Yes.

Q. Isn't it a fact that for every month since and including September, 1954, the original store has lost money, according to your records?

A. Yes.

Q. Isn't it also true that Guam Frozen Products opened a competing store?

A. That is right; yes, sir.

Q. Do you have any idea what the situation is for January, 1955?

A. Not too good. About the same. We can tell.

Q. When you opened the other store——

A. Well, that isn't the cause of it.

Q. But the fact is that when you opened the other store the sales went down?

A. Yes; we had two drops in sales. We had a drop last spring, too. [126]

Q. This is the first month that the Dairy Queen of Guam ever lost money?

A. That is correct.

Q. But the sign, "Dairy Queen," is also on the other store? A. That is right, yes.

Q. Is there any distinction between the two stores so that the public knows one by one operator and one by another? A. No, sir.

(Testimony of Edward Thompson.)

Q. Is the equipment the same?

A. That is right.

Q. The format and appearance is the same?

A. Yes.

Q. And the sign the same?

A. That is right.

Q. Who is manager of Guam Frozen Products?

A. Norman Thompson.

Q. How much is he paid for that?

A. \$100.

Q. And as manager of the old store, how much is he paid? A. \$500.

Q. So he is paid \$500 from the old store and \$100 for the other? A. Yes.

Q. Where does the new corporate store get supplies?

A. From the American Pacific Dairy [127] Products.

Q. Are they billed through the account here in Guam? A. Yes.

Q. So it is fair to say they get all their supplies from what was formerly known as the Dairy Queen of Guam?

A. They get them from the same outfit here, yes. I wouldn't think that is quite the statement.

Q. Tell me how it works.

A. American Pacific Dairy Products has a warehouse. They buy the goods, put them in the warehouse and charge to each store the supplies that are issued, but because American Pacific warehouse considers the old store 100 per cent, we don't have

(Testimony of Edward Thompson.)

an accounts receivable for them. We just charge it in the books as a debit.

The Court: Would you care to advise counsel at this time why five times as much money is charged to the Dairy Queen operation as to the new operation?

A. Because in the agreement with Joe Siciliano we had the same agreement. He was to get \$600 a month for the first store and less for any additional stores because the additional stores do not require so much to handle. He was to get \$600 for the first store and then \$100 or \$200 for each additional store we opened.

The Court: Your contention is that Norman stepped into the shoes of Joseph Siciliano?

A. We followed the same pattern but at a lesser rate. [128]

The Court: In actuality does he only devote one-sixth of his time to the new store?

A. I wouldn't say that, your Honor, but, for instance, in ordering supplies it requires a certain amount of time anyhow and he can order for both stores at the same time; he can instruct the boys at the same time. It is a pattern that is followed elsewhere. In Seattle we have put in a manager for more than one store.

The Court: In Seattle you have a common ownership?

A. That is true.

The Court: Here you have a separate corporation and the separate corporation gets the benefit

(Testimony of Edward Thompson.)

of the services for which it is not paying proportionately?

A. We don't think so, your Honor.

The Court: Why not if it gets an equal portion of Norman's services?

A. Norman spends most of his time at the old store. He is there most of the time. We made that deal with Mrs. Litch and Mr. Hevessy because we had made the same sort of a deal with Mr. Siciliano, and at the time I made the deal it didn't occur to me that they were separate corporations or separate interests.

The Court: Have either Mrs. Litch or Mr. Hevessy participated in the management of the second store?

A. No, sir. [129]

The Court: Then why do you contend that Mr. Siciliano isn't entitled to participation on the same basis in the second store? You have denied Mr. Siciliano the right to participate in the profits?

A. That is right; yes, sir.

The Court: You just said you have Mrs. Litch and Mr. Hevessy in the second store?

A. We organized the corporation and they bought stock in it.

The Court: You have the use of their money?

A. Yes.

The Court: And you had the use of Mr. Siciliano's money?

A. Yes.

Q. What is the distinction? I am trying to be

(Testimony of Edward Thompson.)

fair about this thing. Why do you think Mr. Siciliano should be out and Mrs. Litch and Mr. Hevessy in and charged against the benefits of the store that Mr. Siciliano's money helped to create?

A. At the time I went into it with Mrs. Litch and Mr. Hevessy, Mrs. Litch was the wife of the commanding officer of Guam. We thought that might be worth something. She had the Helping Hands of Guam and we thought it would help us and Mr. Hevessy, manager of Luzon Stevedoring Company, suggested he could help. Mrs. Litch was transferred from the island last spring and Mr. Hevessy left the island last spring and that [130] ended that. The advantage we thought we were getting practically disappeared. Mrs. Litch and Mr. Hevessy did not have a partnership agreement. They bought stock in a corporation just like the stockholders in our corporation.

The Court: Proceed.

Q. (By Mr. Bohn): Mr. Thompson, when was the first time you met Mr. Siciliano?

A. In February, 1951, some time between the 4th and 8th of February, 1951, the day I first landed on Guam.

Q. When was the first time you communicated with Mr. Siciliano? A. Before that date.

Q. About when would that be?

A. It might have been as early as December, '50; I don't know.

Q. Could it have been as early as September, 1950?

(Testimony of Edward Thompson.)

A. If I mentioned having met Mr. Way, it might have been that early, yes. Mr. Way was the one who suggested I contact Mr. Siciliano.

Q. Who was Mr. Way?

A. He told me in Seattle he was the resident engineer of Pacific Island Engineers. He lived here for three years and he spoke very highly of Mr. Siciliano.

Q. So some time thereabouts in 1950 you communicated with Mr. Siciliano? [131]

A. I probably did; I don't remember now.

Q. Did you ask him for any help in getting a store opened on Guam?

A. I don't know. You suggested I did so I am not denying it.

Q. I show you what purports to be a copy of a cablegram dated September 19, 1950, as soon as your counsel has had an opportunity to glance at it, and I will ask you if you sent that cablegram?

A. I haven't the slightest recollection but I think I must have sent it; my name is on it.

Q. I will read you the cablegram. It is directed to Pacific Enterprises and is dated September 19, 1950, and reads as follows: "Relet Way you authorized to apply for license ice cream and reconstituted milk behalf American Pacific Dairy Products, Inc. Letter follows."

A. I don't remember but my name is one it and the reference to a man by the name of Mr. Way, I probably did. Perhaps it was sent by Mr. Little; I don't know.

(Testimony of Edward Thompson.)

Q. Did you, late in 1950, authorize Mr. Siciliano to apply for a license for your corporation for the sale of various types of dairy products on Guam?

A. I don't remember.

Q. Well, is it possible that you did?

A. It is possible, yes. [132]

Q. Do you know whether in fact Mr. Siciliano did make such application?

A. I don't remember. I don't know that he did, no, to tell you the truth.

Q. Did you ever in late 1950 or early 1951 direct a letter to Mr. J. J. O'Connor, Director of Commerce of the Government of Guam, with respect to becoming licensed on Guam to sell dairy products?

A. I did, yes; I remember that, yes.

Q. Isn't it a fact that prior to that time you had communicated with Mr. Siciliano and asked him to be of assistance to you in that matter?

A. I possibly did; I don't remember. I am not denying it; it is entirely probable.

Q. Did you start trying to get organized and operating in Guam as early as late 1950?

A. I hadn't been over here by then but we were laying the ground work, yes.

Q. You were getting started? A. Yes.

Q. Did Mr. Siciliano render any services to you in helping you get started on Guam?

A. I don't think he did, no, because I think I made the application myself when I came over here.

Q. About when would that be? [133]

(Testimony of Edward Thompson.)

A. Early February, 1951. I don't mean Mr. Siciliano didn't help me. He was very helpful. He drove me around, introduced me to people, things like that.

Q. As a matter of fact, wasn't Mr. Siciliano appointed your resident agent on Guam in February, 1951? A. I think he was, yes.

Q. Did he look for property for you to lease?

A. He did, yes.

Q. Did he communicate with you about it?

A. Yes.

Q. And did your correspondence with Mr. Siciliano, starting in 1950, continue right on to June, '52?

A. The correspondence did but the relation ceased in May when he wrote me—let me go back a moment. When I came over in February, 1951, I had never seen Mr. Siciliano. I met him the morning I landed and we introduced ourselves. He took me up to see the Governor. The Governor was the only one I knew on Guam. He took me in to see Mr. Guerrero, Land Commissioner, and Mr. O'Connor and others and he wanted 50 per cent of the deal when we discussed it and I told him we couldn't give him 50 per cent of the deal. I offered him 20 and when he still wanted 50 I explained to him that none of us had that much. It would have made him the largest stockholder of them all. I don't think he said he would take 20 but I left here thinking he was going to buy stock like the rest of us. On May 12 I heard from [134] him and he had been thinking it over and he was no longer interested in

(Testimony of Edward Thompson.)

the deal unless it was a 50 per cent deal but he would be glad to help me in any way. I asked him to contact Slaughter or I contacted Slaughter by letter. I don't know whether Mr. Siciliano contacted Slaughter or not even though he had offered to do anything he could to help.

Q. He was never compensated for that assistance?

A. It was just friendliness; at least I thought it was.

Q. He has never presented you with a bill?

A. Oh, no.

Q. But he did start as managing agent for you on Guam? A. He never filed it.

Q. Let me ask you, if you please, if that reads Jose D. Leon Guerrero, notary public?

A. Well, I didn't know he had filed it.

Mr. Phelan: Well, I don't see how this witness can be asked to verify Joe Guerrero's signature.

Mr. Bohn: I didn't ask him to verify it. What was the answer?

The Court: He answered that he didn't know he had filed it.

Q. (By Mr. Bohn): Was he authorized in 1951 to act as your agent? A. He was, yes, sir.

Q. Did he look for land for you and write to you about it? [135] A. He did.

Q. Did he suggest to you perhaps that Mr. Slaughter might be interested in this transaction?

A. I think that suggestion came from a man in Honolulu. I think I asked him to sound out Slaugh-

(Testimony of Edward Thompson.)

ter and see if he was interested. He offered to do what he could to help.

Q. He wanted 50 per cent of the deal and you were not willing to give him a 50 per cent deal at that time?

A. Mr. Siciliano had withdrawn from the picture in May; May 12, 1951, he wrote me and said: "After thinking it over I don't want any deal unless it is 50 per cent so, therefore, you had better count me out and make other arrangements." We were friendly and he knew what was going on.

Q. Throughout all this period?

A. Yes; there was no attempt to conceal from one or the other.

Q. When the deal with Slaughter fell through you wrote to him and asked him for help again?

A. In January, 1952, I wrote him and told him I wasn't happy with Slaughter's handling of the job. I didn't know Slaughter was in the States at that time, and I asked him if he was still interested in 50 per cent and he wrote he was always interested in a good deal and what were my commitments to Slaughter and all like that.

Q. And it was at that time the negotiations started? [136]

A. No, sir; the negotiations started when I came on the island. Later on Slaughter was doing a better job and I thought we would stick with Slaughter but he was going to Ethiopia.

Q. Wasn't it January, 1952, you just testified

(Testimony of Edward Thompson.)

you wrote to Siciliano and said, in effect: "Would you be interested in a 50-50 deal?"

A. Yes. Have you got the letter?

Q. I will show you a copy of that letter and ask you to read it.

A. This is January 24, 1952, addressed to Mr. Joseph Siciliano——

Q. It isn't necessary to read it out loud. I would just like you to verify it.

A. Yes; I still think he is one of the ablest men I know.

Q. I will refrain from commenting on how you have treated one of the ablest men you know.

A. Well, he didn't live up to his agreement.

The Court: I want the record to show Mr. Thompson's statement to the effect that the plaintiff in this case is "one of the ablest men I know" and that applies today?

A. Yes; maybe my acquaintance is limited but I think he has great initiative and ability.

The Court: Very well, the court will take a 15-minute recess at this time.

(The court recessed at 3:10 p.m., February 14, 1955, and [137] reconvened at 3:25, February 14, 1955.)

Mr. Bohn: May I proceed, your Honor?

The Court: Yes; please proceed.

Mr. Bohn: Will you read the last answer?

(The reporter complied with the request.)

(Testimony of Edward Thompson.)

Q. (By Mr. Bohn): You testified, Mr. Thompson, in January, 1952, you wrote saying in substance that you were dissatisfied with your agreement with Slaughter, the way things were going, and you at that time offered Siciliano a 50-50 deal, is that correct?

A. No; I asked him if he would be interested in a 50-50 deal or words to that effect and told him I thought it would be advantageous to both of us.

Q. You asked him if he would be interested in a 50-50 deal and what was his answer?

A. He wrote back and said he was always interested in a good deal but there were some things he would like to know. First, he asked me what my commitments were to Slaughter and some other questions I have forgotten and I presume I answered that letter.

Q. Did you, subsequent to his response—did you then come out to Guam and make a deal with Mr. Siciliano?

A. I came out to Guam in June, '52, and we signed that agreement.

Q. That we have been discussing, is that right?

A. Yes, sir. [138]

Mr. Bohn: Is it stipulated, Mr. Phelan, that all those agreements were executed by Mr. Thompson or do you want me to ask him about each one of them?

Mr. Phelan: Just have him identify his signature.

Mr. Bohn: May I see those agreements, please?

(Testimony of Edward Thompson.)

Q. (By Mr. Bohn): First, I will show you Plaintiff's Exhibit 1 which purports to be a certified copy of a resolution adopted by the American Pacific Dairy Products at a meeting held on March 2, 1951, appointing Mr. Joseph Siciliano managing resident agent of Guam for the corporation and ask you if that, in fact, occurred on that date?

A. On March 2, 1951? That is about the time I returned to Seattle then.

Q. And this is the official appointment of him as managing agent? A. Yes, sir.

Q. I show you Plaintiff's Exhibit No. 2, which purports to be a copy of articles of co-partnership and has been identified as such by Mr. Siciliano and ask you if that is your signature on that agreement?

A. Yes; that is mine.

Q. I will show you Plaintiff's Exhibit No. 3, which purports to be a copy of a supplemental agreement to the one just identified, and ask you if that is your signature on that agreement? [139]

A. That is right; it's there in three places.

Q. As you point out in answer to my question, it is there in three places? A. That is right.

Q. The first place you signed as president of American Pacific Dairy Products, in fact in two places you sign as president of American Pacific Dairy Products and then there is contained the language, "I agree to individually be bound by the foregoing agreement," and then there is the date, June 23, 1952, and then your signature again, "Edward Thompson," as an individual? A. Yes.

(Testimony of Edward Thompson.)

Q. You also agreed to be bound as an individual also? A. Yes.

Q. And I show you Plaintiff's Exhibit No. 4, which purports to be an assignment of lease of real property, and ask you if that is your signature on that document? A. That's mine; yes, sir.

Q. I call your attention to these signatures, Mr. Thompson—here again you have signed twice, is that correct?

A. I don't know; yes, I might have.

Q. Perhaps as I ask the questions it may appear why the first signature is American Pacific Dairy Products, Inc., by Edward Thompson, president?

A. That is right, yes. [140]

Q. And underneath is the typed word "assignor," meaning the person who is going to transfer the lease. The second signature reads as follows: "Dairy Queen of Guam by Joseph Siciliano, general co-partner," and "American Pacific Dairy Products, Inc., by Edward Thompson, general co-partner"?

A. Oh, I can see why I signed twice, yes.

Q. You signed once as president of American Pacific Dairy Products as assignor and once as a partner in Dairy Queen? A. Yes.

Mr. Phelan: Didn't he sign on behalf of American Pacific and not as an individual?

A. Yes; general co-partner, assignor.

Mr. Phelan: He signed in both cases as president of the corporation?

A. Yes.

(Testimony of Edward Thompson.)

Mr. Bohn: Yes; in one case as assignor and the other case as corporate partner, the person who signed as corporate partner. May I have the partnership agreement again? I will request the permission of the court to return to a previous document, Plaintiff's Exhibit No. 3. I would like to ask one or two more questions as to those signatures. May I proceed, your Honor?

The Court: You may proceed.

Q. (By Mr. Bohn): You stated awhile ago that you had signed this particular document three times. This is an [141] agreement between American Pacific Dairy Products, Inc., a corporation duly organized under the laws of the State of Washington, hereinafter referred to as American Pacific, party of the first part, and American Pacific Dairy Products, Inc., and Joseph Siciliano, co-partners, doing business in the Territory of Guam under the fictitious name and style of Dairy Queen of Guam, hereinafter referred to as Dairy Queen, parties of the second part, and in the signature on the last page, I repeat myself, you signed it three times—first as president of American Pacific Dairy Products, Inc., party of the first part; secondly, American Pacific Dairy Products, Inc., by Edward Thompson, president, and Joseph Siciliano, and there appears under that the cumulative reference, “parties of the second part.”

Mr. Phelan: What is the date?

Mr. Bohn: This is the agreement dated June 23,

(Testimony of Edward Thompson.)

1952, containing certain information supplementing the partnership agreement.

Mr. Thompson: Isn't it in connection with Okinawa?

Mr. Bohn: It contains the information that "American Pacific hereby sells, transfers and assigns unto the parties of the second part all of the assets of the Dairy Queen store which it has constructed on Guam, including the building, stock in trade, furniture, fixtures, and supplies" and other matters and the party of the second part, that is the partners, acknowledge [142] they have received these items and also they have received the lease and there is certain information, in fact, that there is due to American Pacific from Dairy Queen the sum of \$8,000 and some on capitalization and also covers a reference to Okinawa.

Q. (By Mr. Bohn): Mr. Thompson, on or about June 21, 1952, did you join in a letter to—I am sorry—I will return these other exhibits. May I withdraw that question? One more document I would like to have you identify—Plaintiff's Exhibit No. 5 purports to be a certificate of a co-partnership transacting business under a fictitious name. I ask you if that is your signature?

A. Yes; that is my signature.

Q. And this contains the following statement: "We, the undersigned, certify that we are partners transacting a wholesale and retail ice cream, snack bar and dairy products business on Lots No. 1413, 1413-1, and 1414, Agana, Guam, under the fictitious

(Testimony of Edward Thompson.)

name: Dairy Queen of Guam. The names of all the members of said co-partnership and their respective addresses are as follows, to wit: Joseph Siciliano, Maite, Barrigada, Guam, and American Pacific Dairy Products, Inc., Seattle, Washington," signed by Joseph Siciliano and by Edward Thompson, president of American Pacific Dairy Products, Inc., of Seattle, Washington, is that correct?

A. That is my signature, yes, sir.

Q. Did you on or about June 21, 1952, join in a letter [143] with Mr. Siciliano directed to Major H. W. Grossman, Post Exchange Office, Anderson Air Force Base?

A. We did, yes.

Q. Did you in that letter state to Major Grossman that you were making a proposition to him about operating a dairy business on the field and did you state that this organization will be a co-partnership composed of Joseph Siciliano and Edward Thompson with, perhaps, several other partners, but in any event all of the majority interest would be Joseph Siciliano's and Edward Thompson's?

A. Yes, I did.

Q. You go on to state that if there is something on Anderson Air Base other partners might come in?

A. That is right.

Q. But you represented to Major Grossman that this was going to be a partnership?

A. That is right, yes.

Mr. Bohn: I think I have no further questions of this witness.